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Senate Confirms Calhoun

The Senate has confirmed Jerry Lee Calhoun as a member of the Federal Labor Relations Authority to a term expiring July 29, 1987. Calhoun assumed his new responsibilities as FLRA chairman on December 16. Prior to that he held several sub-cabinet posts at the Defense Department in the areas of manpower and labor relations, as well as earlier industrial relations positions with the Boeing Company. ■

Board Upholds Dismissal of Alcoholic Employee

If an alcoholic employee fails to successfully rehabilitate himself, a federal employer has no obligation to bear the burden of absences caused by his alcoholism, the Merit Systems Protection Board rules.

The case concerned an Army employee fired on charges of absence-without-leave, disruptive conduct, insubordination, and reporting for duty while drunk. Although the appellant agreed that most of the charges were true, he claimed that the agency failed to accommodate his alcoholism.

The Board explained that under the law, an agency must make the employee aware in general terms that a problem exists with work performance. Management must also recommend that he participate in available rehabilitation or counseling programs.

But if attempts at rehabilitation fail, the agency has no obligation to continue to bear the burden of the employee's absences by paying overtime to replacement workers. Further, it need not place the burden on other employees by requiring them to work double shifts. The Comprehensive Alcohol Abuse Act does not prohibit removing employees who can't function properly.

The appellant had a history of alcohol-related problems, including confinement in a work release center for drunk driving. Months before his dismissal his supervisor warned that he might be fired if he were AWOL again, but that punishment could be suspended if he entered a rehabilitation program and finished it successfully.

Although the employee entered a program, the rehabilitation staff terminated him from the program because of his continued denial of a problem and lack of motivation to participate in treatment. At that point management removed him. The Board, finding that the Army had complied with all requirements, upheld the removal. (*Burchell v. Army*, MSPB Doc. No. ATO7528510271, November 22, 1985) ■

NEW Developments...

New chairman named at FLRA... 1

Board overturns removal of employee whose thefts were *de minimis*... 1

Arbitration Roundtable
Should management have authorized administrative leave during ice storm in New Orleans? 2

Federal bargaining calendar
for first six months of 1986... 3

MSPB issues two sets of new regulations... 4

Agency's improper manipulations void its demotion of employee during RIF... 4

The Rubik Cube Case

The Merit Systems Protection Board has reduced the U.S. Postal Service's removal of a distribution clerk to a 90-day suspension because the worker's offense was *de minimis*. The employer had charged the appellant with taking four packages, each containing a Rubik cube worth about $6.00.

The clerk contended that since the boxes were in a pile of third-class mail designated by letter carriers as having "no obvious value," he believed they should be treated as waste. He gave them to co-workers for their children. The employer argued that employees are custodians of clients' property, and that the appellant knew, or should have known, that taking "mail stream" property was prohibited.

The Board, citing *Douglas v. Veterans Administration*, said that several factors must be considered in determining an appropriate penalty: nature and seriousness of the offense; employee's past disciplinary record; potential for rehabilitation; and adequacy of other punishments.

MSPB applied the *Douglas* criteria. The stolen items were of little value and the appellant received no personal gain from taking them. He had a good record of 12 years with the Air Force and six with the Post Office. His supervisor testified that the employee was considered honest and was never unfaithful or incompetent. Moreover, the appellant admitted his misconduct. He had a reasonable misbelief that the boxes were to be treated as waste.

(Continued on page 4)

PM 1.13:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Button Up Your Overcoat

Casefacts: Local 2341, American Federation of Government Employees filed a grievance against the Agriculture Department's National Finance Center (NFC) in New Orleans. The union charged that on January 21 and February 29, 1985, management unfairly denied administrative leave to employees.

On January 20 and 21 New Orleans had a severe ice storm. Hazardous weather conditions caused the closing of many bridges and roads, and telephone and electrical services were disrupted in a number of areas.

Radio and TV stations reported that schools and all city, federal and state agencies were closed. Companies were asked to close their offices. Police urged people to stay home unless it was absolutely necessary to leave.

Because of the adverse weather conditions, NFC released employees at 5:00 p.m. on January 20 and granted administrative leave to those working the graveyard shift. It gave day shift employees on the 21st a maximum of two hours administrative leave if they reported to work before 11:00 a.m.

The union said the bad weather prevented over half of the center's work force from reporting to work on January 21. Employees testified that they could not check with NFC because their phones were out of order. Some said they called and received no answer. Those who got through were told to report only if it was safe to do so.

The contract required the parties to comply with the Federal Personnel Manual and agency policies, and NFC agreed to comply with health and safety laws and regulations. AFGE asserted that the agency failed to follow FPM policy authorizing administrative dismissal for "emergency conditions due to extreme weather conditions . . . or serious disruption to public transportation services."

Management claimed there was no declared emergency. Employees making a reasonable effort could get to work, and many did so. Employees knew that NFC policy obliged them to call their supervisors in the event of doubts as to the status of work, and they should have done so. NFC was not responsible for misinformation aired by the media.

The second part of the grievance concerned Mardi Gras Day on February 29. According to AFGE, significant numbers of employees could not report for work because of transportation problems caused by traffic congestion. Also, NFC ignored instructions issued by the New Orleans Federal Executive Board that federal agencies be closed that day and administrative leave granted.

The employer explained that it handled over five billion dollars a year. It was essential that payroll and other checks be issued on time.

NFC contended that the union failed to prove local transportation was so disrupted that employees were prevented from reporting to work. Moreover, the Executive Board memo applied only to agencies within the central city area, whereas NFC was located in the outskirts of New Orleans.

Issue: Did management violate the contract and FPM and NFC policies by not granting administrative leave on January 21 and February 29?

Award: Arbitrator F. Jay Taylor in part sustained and in part denied the grievance. He ordered NFC to grant administrative leave to employees unable to report to work on January 21 due to extreme hazardous weather conditions, but denied leave for hours worked by those who reported to work that day. He denied the grievance for leave on February 29.

The arbitrator noted that large numbers of the NFC work force were unable to report for work on January 21. Although it might be, as NFC suggested, that some grievants made less than a good faith effort to get to work, he was not persuaded that this was true in most cases.

He concluded that most employees either made a reasonable effort to get to work or had legitimate reason to believe that all federal agencies were closed and that it was hazardous to life and property to attempt to drive or risk public transportation.

FPM guidelines allowed group dismissal of workers when warranted by bad weather conditions. An NFC rule said that when weather was severe enough to be a health and safety risk, off-duty employees should listen to radio and TV stations for emergency announcements to federal workers.

Employees who listened heard repeated announcements that all federal offices were closed. How were they to know they were hearing misinformation? There was no evidence that a correction was aired.

The employees heard that state and city offices were closed, and police warned people to keep off the streets. Those workers able to get through to NFC by phone were told to come in later if possible. Although the employer contended this did not constitute a *bona fide* emergency, affected workers had no reason to believe otherwise.

He was unconvinced by management's argument that if 45 percent of the employees got to work, the remaining 55 percent could have done so. It was quite common under ice storm conditions for one person to be able to get to work while another could not. There was no basis to conclude that those who did not make it should be faulted.

Arbitrator Taylor found no merit to the union's claim for administrative leave or compensatory time for hours worked on Mardi Gras. The Executive Board instructions did not apply to the NFC office.

The grievants' office was located many miles from the congestion caused by festivities in the heart of the city. While this probably inconvenienced employees, there was no showing they could not drive to work or ride the bus. (*Agriculture and Local 2341, AFGE*, September 20, 1985. LAIRS No. 16883) ■

Federal Bargaining Calendar

January through June 1986

The Office of Personnel Management's Labor Agreement Information Retrieval System (LAIRS) has identified federal sector agreements expiring during the first six months of this year. The contracts cover non-Postal bargaining units regulated by the Federal Service Labor-Management Relations Statute.

The calendar shows the expiration date of major agreements (those covering 1,000 or more workers) expiring in January through June 1986. It includes the parties to the contract, the number of employees covered, and the type of agreement.

"Auto-open" refers to contracts with a fixed initial duration, after which no limit is placed on renewals or the length of renewal periods. "Auto-limited" describes automatic renewal agreements which limit either the number of renewals or the length of renewal periods. Other agreements run for two or three years.

The data appears in *Labor Agreement Expirations in the Federal Service, July 1, 1985—June 30, 1986.* The report is available at $11.95 for a paper back copy and $5.95 for microfiche from the Department of Commerce, National Technical Information Service, Springfield, VA 22161, telephone 703/487-4650, using Order No. PB86113776.

	Parties	Employees Covered	Type of Agreement
JANUARY			
11	Veterans Administration, Washington, D.C.—NFFE	2,750	auto-limited
13	Hickam AFB, Hawaii—IBEW 1186	1,495	auto-open
13	Army Med. Center, Denver, Colo.—AFGE 2214	1,164	3 years
30	Tooele Army Depot, Utah—IAM 2261	1,327	3 years
FEBRUARY			
2	St. Elizabeth's Hospital, Washington, D.C.—AFSCME 2095	1,523	auto-limited
MARCH			
7	Army, Fort Huachuca, Ariz.—AFGE 1662	2,223	not available
30	Charleston Naval Shipyard, S.C.—AFGE 1864	1,188	auto-open
APRIL			
1	Army & Air Force Exchange Service, Fort Gillem, Ga.—RWDSU 938	1,617	auto-open
3	U.S. Air Force Academy, Colo.—AFGE 1867	1,378	not available
5	Army, Fort Meade, Md.—AFGE 1622	1,244	not available
19	Naval Air Rework Facility, San Diego, Calif.—IAM 726	3,400	auto-limited
24	U.S. Military Academy, W. Point, N.Y.—AFGE 2367	1,895	auto-open
MAY			
12	Army & Air Force Exchange Service, Dallas, Tex.—NFFE	1,056	auto-open
18	Gov't Printing Office, Washington, D.C.—AFGE 2876	1,608	not available
22	Energy, Washington, D.C.—AFGE	3,726	auto-open
JUNE			
10	Social Security Admin., Baltimore, Md.—AFGE 1923	61,053	auto-limited
19	Naval Air Rework Facility, Cherry Point, N.C.—IAM 2297	1,959	auto-limited
22	NASA, Huntsville, Ala.—AFGE 3434	1,100	auto-open

No Call-Back Pay for Work at Home

The Comptroller General rules that Federal Aviation Administration employees who can adjust equipment malfunctions from their home by using microcomputers are not entitled to two hours' call-back time.

The law guarantees two hours' pay to employees called back to work as compensation for the inconvenience of returning to work, as well as for the work actually performed.

The CG decided that for FAA employees working at home, however, guaranteed call-back time was not appropriate. They are entitled to pay only for hours actually worked. (Comptroller General, *B-217502*, October 31, 1985) ■

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MSPB Issues New Regs

In the December 10 *Federal Register* the Merit Systems Protection Board announced that when cases cannot be processed within its standard time frame because of reasons over which the Board has no control—such as court-imposed stays—it will notify parties of the delay. When the constraint is removed, it will inform parties of the new completion date for processing the case.

The Board had previously set a limit of 120 days from time of filing to process initial appeals, and 110 days from filing to process petitions for review. After experience with those time limits, MSPB found that it had to clarify their application. MSPB's new procedures became effective on December 10.

* * * *

The Board and the Equal Employment Opportunity Commission have issued interim regulations for the organization and proceedings of their Special Panel. The Civil Service Reform Act established the panel to resolve conflicts between EEOC and MSPB in adjudication of mixed cases involving appeals of adverse personnel actions and alleged discrimination. The announcement appeared in the *Federal Register* of December 27, and the interim regulations went into effect that day. ■

Demotion during RIF Was "Improperly Motivated," Board Rules

The Merit Systems Protection Board upholds the appellant's claim that the Department of Energy improperly downgraded him during a reduction-in-force. The appellant asserted that the employer promoted Employee X just before a reduction-in-force to protect him from being bumped to a lower job by the appellant. Instead, the appellant was demoted.

A year prior to the RIF an Energy official had tried to have Employee X promoted on the grounds that new duties had accreted to his position. The agency's personnel department denied the request.

Later, when the official realized that the appellant was eligible for Employee X's position in the up-coming RIF, he asked a classification specialist how to protect Employee X. The specialist prepared an option paper, and the official chose the suggestion of promoting Employee X, based on accretion of duties.

The Board held that the the employer improperly manipulated events, thus violating the appellant's RIF rights. Consequently, his demotion must be cancelled. (*Peters v. Energy*, MSPB Doc. No. DCO3518510098, October 31, 1985) ■

Rubik, *(Continued from page 1)*

The penalty was too harsh, the Board concluded, and the maximum reasonable penalty was a 90-day suspension, (*Taylor v. U.S. Postal Service*, MSPB Document No. CHO7528310199REM, November 19, 1985) ■

Conference Schedule

The Society of Federal Labor Relations Professionals is holding its 14th annual symposium February 20-21 at the Capitol Hilton Hotel, Washington, D.C. This year's theme is "Strategies for a Changing Labor-Management Climate."

Among the speakers are Jerry L. Calhoun, new chairman of the Federal Labor Relations Authority, and Stephen I. Schlossberg, Deputy Undersecretary for Labor-Management Relations, U.S. Department of Labor.

Topics include "What Arbitrators Don't Like about Federal Cases," "Role of the Federal Mediation and Conciliation Service," "Pay Equity," and "Update on OPM Regulations." There will be a showcase of automated data information systems.

For details, contact the Society, 2025 I St. N.W., Suite 216, Washington, D.C. 20006, phone 202/466-4048. ■

Court Finds Agency Duty to Bargain

When the Federal Labor Relations Authority makes a negotiability determination, the U.S. Appeals Court for the District of Columbia says, the parties from whose negotiations the case arose must bargain even though the agreement they were negotiating expired before FLRA issued its ruling. The only exception would be if they agreed to waive further negotiations.

The case began when the Authority held that four proposals made by Local 32, AFGE to the Office of Personnel Management were negotiable. (It had taken FLRA four years, under the expedited negotiability appeals system, to render its decision.) OPM refused Local 32's request to bargain on the proposals, arguing that the contract relevant to the original proposals had expired. The Authority filed for an enforcement order which the court granted.

The court rejected OPM's contention, holding a negotiability appeal is not mooted when the agreement ends. Here there was no agreement, waiver or changed circumstance which eliminated the union's right to bargain. AFGE had consistently demanded bargaining, and OPM had an obligation to negotiate. (*FLRA v. OPM, Local 32, AFGE, intervenor*, USCA D.C. Cir., No. 84-1325, December 13, 1985) ■

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Worker Concealing Alcoholism Can't Claim Discrimination

The Department of Commerce could not have reasonably known that the appellant was an alcoholic, the Merit Systems Protection Board determined. Consequently, the agency was not required to offer reasonable accommodation to a worker who never reported his drinking problem.

MSPB dismissed the appellant's claim that the employer discriminated against him on the basis of a handicapping condition by removing him for alcohol-related misconduct.

Commerce had fired the employee for AWOL and failure to comply with leave restrictions imposed because of leave abuse. He told his supervisors that his leave problems were due to stress at home and on the job, and to such medical problems as a strained back, ulcers, hypertension, etc.

The appellant always appeared in full control of himself when in the presence of supervisors. Management knew he was under medical care and knew the diagnoses of his ailments. No diagnosis mentioned alcoholism. He admitted that, prior to his MSPB appeal, he had never specifically indicated the true nature of his problem to his superiors.

In considering the appellant's initial appeal of his removal, an MSPB presiding official found Commerce guilty of handicapped discrimination. She ruled that the employer should have known, despite the appellant's silence, that he was suffering from alcoholism.

When the full Board reviewed the case, however, it upheld the removal action. The Board relied on previous decisions holding that an agency is obligated to provide reasonable accommodation only to *known* handicapping conditions. (*Ferguson v. Commerce*, MSPB Doc. No. ATO7528410532, November 4, 1985) ■

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When Temporary Employees Grieve

A proposal by the National Federation of Federal Employees allowing temporary employees to use the negotiated grievance procedure to grieve the procedures and evidence used to remove them is negotiable, the Federal Labor Relations Authority determines.

The Authority observed that the parties bear the burden of creating a record upon which FLRA can make a negotiability determination. Here the U.S. Army Corps of Engineers had alleged that terminating temporary workers was a management right, but it provided no argument to show that the proposal would prevent it from acting at all with respect to any of those rights.

NEW Developments...

Employer has no duty to reasonably accommodate worker who hides alcoholism problem... 1

Court overturns Authority holding that distribution of paychecks is not negotiable...

Arbitration Roundtable
Painters and sandblasters at naval shipyard claim employer violated contract by not providing winter jackets... 2

Labor-Management FORUM
Court orders MSPB to follow five standards for determining validity of threats... 3

Employee fired for lying on job application...

Agency head may disallow contract with FSIP-imposed provisions considered illegal, court rules... 4

Appeals court finds FLRA illegally changed reg on stays of arbitration awards...

Another part of the proposal dealt with use of the negotiated grievance procedure in removals of probationary workers. The Authority, reaffirming its earlier stand, ruled that part nonnegotiable. (*20 FLRA No. 93*, November 4, 1985) ■

Court Upsets Two FLRA Rulings

In a consolidated decision, an appeals court overturns two Federal Labor Relations Authority rulings that union requests to bargain over the distribution of paychecks were not negotiable. The Metal Trades Council and the American Federation of Government Employees wanted the Navy to distribute the checks at worksites, rather than mailing them to employees or their banks.

The Authority concluded that the issue fit within the category of "technology, methods and means of performing work"—an area in which the law prohibits negotiations unless management elects to do so. Here the employer had decided not to bargain.

FLRA's premise was that the Navy needed a committed workforce to accomplish its mission. Since a workforce was assured only if workers were paid, paying them was part of performing work. The manner of distributing paychecks was a "method or means" of paying the employees.

"This line of reasoning proves too much," the Ninth Circuit said. Because any benefit to workers is a means of re-

(Continued on page 3)

M 1. 13:

ARBITRATION
roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Clothes Encounters

Casefacts: Shop 71 painters and sandblasters at the Portsmouth Naval Shipyard in Virginia claimed disparate treatment because the employer had issued winter jackets to some employees but not to them.

In Article 4 of the 1981-84 contract between the shipyard and the Federal Employees Metal Trades Council (MTC), the parties agreed that all contract provisions would be applied fairly and equitably to all bargaining unit employees.

Under Article 29 on safety, the agency promised to furnish protective clothing to employees whenever management required that it be worn for safety or industrial health purposes. Management would give prompt attention to MTC's recommendations for new protective clothing or gear.

Moreover, if a study showed an injurious environmental condition existed involving fumes, high and low temperatures, etc., employees would not be required to work in these areas until the condition was made safe by correcting it or by furnishing adequate protective clothing and devices.

The union asserted that the painters and sandblasters work in severe cold and damp weather conditions which in turn required that they wear winter jackets for at least six months each year. Their winter jackets are ruined quickly while working.

The Council alleged that other employees were seen wearing winter jackets with various initials and numbers on them. The wearers reportedly said their jackets were issued by the shipyard.

A production shop planner testified that he was issued a winter jacket in the mid-1970's for the unpredictable times when he might soil his office clothes. He got the jacket before the current agreement went into effect.

According to MTC, management's assertion that the union was trying to gain in arbitration what it failed to gain in negotiations would not wash. The give-and-take of bargaining did not stop either party from going to arbitration if the contract was violated.

The employer said it provided personal protective equipment to painters and sandblasters when needed for safety and health. The furnished equipment included safety shoes, hard hats, rubber boots and gloves, but it did not include jackets in this or any other shop.

In the shipyard's opinion, winter jackets were a matter of personal comfort rather than necessary for health or safety. MTC was unable to show that the agency supplied any craft or trade worker with a jacket, or that management ever ordered any worker to wear one.

Painters and sandblasters were expected to get dirty. That was why they kept work clothes at the shipyard and wore street clothes to and from work. Foremen testified that neither MTC nor employees had ever asked for replacement of a personal jacket or for issuance of a government jacket. This showed the grievants expected to soil their personal clothes while working.

For 16 years the agreement's language on furnishing protective clothing had remained unchanged, the employer noted. Formerly employees painted in below zero weather, but now the temperature must be at least 35 degrees. Yet now that working conditions had improved, MTC sought to have jackets supplied under the guise of safety.

Issue: Did the employer violate the agreement by not issuing winter jackets to Shop 71 painters and sandblasters?

Award: Arbitrator William J. Fallon denied the grievance. He understood the grievants' legitimate concern about working in cold, damp conditions requiring the warm and protective clothing. The jackets were necessary for health reasons, but whether the contract required that they be supplied by the employer was another matter.

Working conditions had improved over the years. Yet even when workers previously painted in sub-zero temperatures, the contract's language on safety was the same then as now.

The critical language here was the agency's agreement to furnish protective clothes when required by management for safety or industrial health purposes. Years before when this language was first adopted, painters and sandblasters undoubtedly wore winter jackets when required to work in cold weather.

No requests were made at that time for winter jackets to be furnished a a matter of health. This led the arbitrator to conclude that winter jackets were not considered to be protective clothing, within the meaning of that term in the safety article.

The long practice of painters and sandblasters supplying without complaint their own jackets when working in cold weather showed the parties' intent to exclude the jackets from the protective clothing furnished by the agency.

The only direct evidence on management's furnishing of winter jackets was that of the shop planner. As an office worker he was not expected to soil his clothes while working. Testimony about other workers claiming to have been issued jackets was hearsay. The different work responsibilities of shop planners and the grievants did not require that they be treated identically. Giving a jacket to the shop planner was not disparate treatment.

The union's bargaining proposals for the 1974 and 1981 contracts would have meant that the shipyard would supply, among other things, winter jackets for employees. The arbitrator found that the proposals reflected a recognition that management's responsibility for furnishing protective clothing was limited.

Arbitrator Fallon said that this, together with the 13-year acceptance of the practice whereby painters and sandblasters supplied their own winter jackets, made it clear that the jackets were one item of protective clothing that was not the obligation of the employer. (*Navy and Fed. Employees MTC*, October 2, 1985, LAIRS No. 16899) ■

The Labor-Management forum

Lying on Application Merits Dismissal

The Bureau of Prisons had just cause to fire a guard who lied on his job application and security form, the Merit Systems Protection Board holds. Although the guard said he thought the questions referred to arrests arising from criminal rather than civil matters, MSPB found it more likely true that he deliberately concealed his arrest and imprisonment for nonpayment of child support.

The employment form asked whether, during the past seven years, an applicant was convicted or imprisoned for any legal offense. The security questionnaire asked if an applicant was ever arrested or taken into custody. According to the questionnaire, only minor traffic violations or events before an applicant's 16th birthday could be omitted.

The guard's concealment of material facts was serious and affected the employer-employee relationship, MSPB concluded. Such an offense was indicative of an appellant's reliability and truthfulness. Accordingly, the guard's removal would promote the efficiency of the service. (*Pichot v. Dept. of Justice, Bur. of Prisons*, MSPB Doc. No. CHO7528510257, December 12, 1985) ■

Court Sets Criteria for Review of Threat Cases

The Federal Circuit Appeals Court sets aside a Merit Systems Protection Board decision which sustained the Treasury Department's removal of an employee who allegedly made threats against his supervisor. The court, finding that MSPB failed to consider the objective evidence in the case, directed it to give heavy weight to such evidence in the future.

Performance rating sparks dispute

A Treasury Department employee received an "Excellent" rating instead of the "Outstanding" he felt he deserved. He angrily told his supervisors and co-workers that he would harm himself and others. The employer fired him for threatening his superiors and for disruptive behavior.

The presiding official at the initial MSPB hearing found him innocent of making threatening statements and reversed the removal. But because the apellant's intemperate remarks caused a minor disruption, he imposed a suspension.

The full Board, however, overturned the presiding official's decision and supported the removal. The Board concluded that a reasonable person hearing the appellant's statements would think those statements were threats.

Court says Board failed to consider objective evidence

While MSPB used the correct legal standard, the Federal Circuit said, it erred in not considering the objective evidence. The court held that to prove a true threat, MSPB must use "the connotation which a reasonable person would give to the words." That is, MSPB must consider: the reactions of the listeners; the listeners' apprehensions; the wording of the statements, the speaker's intent; and the circumstances.

The court said the Board apparently did not do so in this case. No substantial evidence supported MSPB's finding that the appellant intended to actually harm or kill his supervisors or that he behaved disruptively by threatening to kill them.

The court noted that the agency produced testimony by five witnesses. Four of them did not think the appellant's statements were threats or regard them as serious enough to report. The fifth's testimony was discredited by the presiding official.

Credibility determinations of presiding officials

Presiding officials exercise wide discretion when making credibility findings, the court observed, and the full Board could not overturn their "credibility determinations without articulating a sound reason, based on the record." Consequently, the Board should not have credited the fifth witness' testimony.

The court reversed MSPB's decision sustaining the appellant's removal. The court also directed the Board to consider in future decisions the five evidentiary factors specified above regarding the proof of a serious threat.

Judge Nichols disagrees with part of opinion

Judge Nichols concurred in the opinion, but considered unnecessary the court's imposition of evidentiary factors for the Board to use in other cases. He considered this a simple case that could be decided simply. There was no evidence, he said, that the appellant intended to state he would kill or harm himself or anyone else or that supervisors believed they were threatened. (*Metz v. Treasury*, USCA Fed. Cir., No. 85-922, January 2, 1986) ■

Union Reneges on Settlement Agreement

In the judgment of the Federal Labor Relations Authority, Local 1923, AFGE engaged on an unfair labor practice when it refused to abide by a settlement agreement reached with the Social Security Administration.

The grievant and the union met several times with SSA concerning her proposed dismissal. Management finally suggested that it would reduce the removal to a one-day suspension if, in return, the grievant waived rights to grieve further or to arbitrate. The parties signed a settlement agreement incorporating the suggestion. AFGE later notified the agency that it was invoking arbitration.

The Authority ordered Local 1923 to stop repudiating the agreement. The union must also withdraw all grievance and arbitration requests based on the suspension. (*20 FLRA No. 88*, November 25, 1985) ■

FLRA Ruling, *(Continued from page 1)*

taining a stable workforce, FLRA's rationale implied that all wages, hours and working conditions fell within the means and methods exemption. Had Congress meant the exception to extend that far, the court noted, it would not have adopted the federal sector bargaining law. (*MTC v. FLRA, AFGE v. FLRA, Navy, intervenor*, USCA 9th Cir., Nos. 85-7039 and 85-7050, December 20, 1985) ■

"Strong Consideration" Means More Than "Normal Consideration," Board Says

The Merit Systems Protection Board has found the Farmers Home Administration in noncompliance with a settlement agreement reached with the appellant. The employer, the Board held, failed to give the appellant the promised "strong consideration" for positions in the agency.

The case began when FHA fired the appellant. Before his Board hearing, he and FHA reached a settlement agreement. In the agreement the agency said it would give him "strong consideration" when he applied for any FHA positions for which he was qualified, subject to budget limitations.

After applying for 10 jobs for which he was qualified but was not selected, the employee petitioned MSPB for enforcement of the agreement. He charged that when merit promotion panels found him among the best qualified for a regional vacancy, several times the position was reannounced to obtain additional candidates for consideration. The Board sustained this charge.

FHA contended that it had no control over the hiring of employees in the field. Each of its regions selected applicants without the knowledge of agency headquarters, and the appellant had received the same consideration as any other candidate.

The Board saw no indication that FHA ever informed selecting officials of the settlement agreement or its terms. The agency never advised them of FHA's obligation to give strong consideration to the appellant's application.

The agency argued that it had never committed itself to giving the appellant "priority consideration." Consequently, it met its settlement obligations by allowing him to apply for vacancies and receive normal consideration.

The MSPB regional director who referred the case to the Board concluded that management's argument was contrary to the spirit of the agreement. The full Board supported his reasoning, commenting that "The agency's position is saying that the phrase 'strong consideration' means no more than 'consideration.' "

MSPB determined that the agency acted in bad faith. It ordered FHA to reconstruct the selection for each vacancy for which the appellant filed, and to determine whether he would have been selected had his applications been given strong consideration. If so, FHA must retroactively place him in the first position for which he would have been selected, or an equivalent position. (*Myers, v. Department of Agriculture, Farmers Home Administration*, MSPB Doc. No. SFO7528410396COMP, December 5, 1985) ■

Court Chides FLRA for Failing to Follow Established Rule-Making Requirements

The Federal Labor Relations Authority may alter its regulation on stays of arbitration awards only by following Administrative Procedure Act procedures, the District of Columbia Appeals Court rules. The court remand upheld a union charge that FLRA unfairly dismissed its unfair labor practice complaint that an agency failed to comply with an award.

The Authority's long-standing regulations require parties filing exceptions to arbitration awards to comply with the awards unless they also request a stay. Nevertheless, FLRA held that a timely exception without a request for a stay automatically operated as a stay. It made the sudden switch in a brief order affirming an administrative law judge decision, without discussing the significance of the change.

That case stemmed from a federal agency's exception to an award and its refusal to comply, even though FLRA regulations at that time specifically said an exception did not act as a stay. When the American Federation of Government Employees filed ULP charges, FLRA dismissed the complaint.

The D.C. Circuit concluded that although FLRA's initial regulation was reasonable, the Authority could alter it only by following the Act's procedures. FLRA erred by making the change through the adjudicative process. (*AFGE v. FLRA*, USCA DC, No.84-1439, November 22, 1985) ■

Agency May Nix Panel-Imposed Clause

An appeals court sustains a Federal Labor Relations Authority decision that an agency head can disapprove a contract containing a provision he believes is contrary to law or regulation even if the Federal Service Impasses Panel imposed the provision upon the parties.

The U.S. Court of Appeals for the District of Columbia Circuit also upheld FLRA's finding that a union can challenge such management decisions by filing an unfair labor practice charge or using the Authority's expedited negotiability review process. A union cannot, however, arbitrate the issue through the negotiated grievance procedure.

While the Panel has power to settle disputes, it has no authority to determine negotiability issues, the court said. Judge Ruth Ginsburg dissented from the majority opinion, arguing that the FLRA policy gave agencies a unilateral veto over the Panel's impasse-resolving decisions. (*American Federation of Government Employees v. FLRA*, USCA DC, No. 84-1512, December 13, 1985) ■

Consultant

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Court Remands ULP Case to Authority

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DEPOSIT

By a two-to-one majority, the District of Columbia Appeals Court overturns the Federal Labor Relations Authority's dismissal of a union-filed unfair labor practice complaint. FLRA wrongly ruled, the court said, that the Immigration and Naturalization Service did not commit a ULP by conducting an investigatory interview of a patrol agent after denying his request for union representation.

The D.C. Circuit found no substantial evidence to support the Authority's conclusion that the agent could not *reasonably* believe that disciplinary action might result from the interview preceded by a grant of immunity.

The INS investigators wanted to take a statement from the employee as a witness to alleged misconduct by other agents. Promising him immunity from any disciplinary action based upon his statement, they told him that because of the immunity he would not be allowed to have a representative of Local 2544, AFGE at the meeting.

The court observed that the agency had no formal practice of granting immunity of which the agent or local management were aware. Also, the employee's supervisor, who asserted that he had authority to discipline employees, questioned the investigators' authority to grant immunity.

The court judged that in the circumstances of this case, the employee could reasonably have feared discipline. It directed the Authority to issue a cease and desist order to INS. (*AFGE Local 2544 v. FLRA, Justice Dept., intervenor*, USCA DC, No. 84-1479, December 24, 1985) ■

NEW Developments . . .

page

FLRA erred by dismissing an unfair labor practice, charge, court rules . . . **1**

When Authority has only two of three members, its work suffers, GAO says . . .

Arbitration Roundtable **2**

Were First Amendment rights involved when union official wrote Congress on negiotiable matters? . . .

Labor-Management FORUM **3**

Federal employer loses attempt to secure appellate review of award in roundabout way . . .

Employee's court suit was not protected . . .

New ground rules for Foreign Service negotiations call for package bargaining . . . **4**

MSPB holds possession of drugs on agency premises is cause for dismissal . . .

GAO Finds Authority's Lack of Third Member Slows Decision-Making

A report issued by the General Accounting Office says that the absence of a third member of the Federal Labor Relations Authority has delayed decision-making on a number of important cases. The average age of the cases, depending on their type, is 18 to 30 months.

The Authority has been operating with only two members since September 1984. At the present time, its members are recently confirmed Chairman Jerry L. Calhoun and Member Henry B. Frazier III, who serves in a holdover status. The recess appointment of former Member William J. McGinnis expired when Congress opened session last month.

The report notes that FLRA closed a record 822 cases in Fiscal Year 1985. Nevertheless, 127 cases (25 percent of the backlog) were held up because of the lack of a third member. Eighty-nine of these were not sent to the members because they involved issues FLRA's acting chairman and the director for case management believed so important that they required the attention of all three members.

Some of the 127 cases were delayed because of a tie vote between the two Authority members. Others were not forwarded to them because of earlier tie votes in similar cases.

The 89 cases felt to require the attention of the full Board covered three issues:

- Nature and extent of management's duty to negotiate over proposals concerning workers adversely affected by the exercise of management rights.
- Whether and to what extent a union can bargain on matters relating to expenditures of money for bargaining.
- Standards to govern FLRA's review of arbitration awards in grievances challenging procurement awards.

The decisions held in abeyance because of a tie vote mostly concerned the nature and extent of an agency's bargaining obligations over proposals concerning pay and money-related fringe benefits.

The study, *Effects of Unconfirmed Members at the Federal Labor Relations Authority*, was made at the request of the House Committee on Post Office and Civil Service. GAO says that a later report will review the role of FLRA's General Counsel as well as the agency's caseload and case processing. ■

Pm 1.13:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

CGP: Congressional Grievance Procedure

Casefacts: Warner Robins Air Logistics Center denied a request for sick leave and leave without pay made by two employees. A representative of Local 987, American Federation of Government Employees wrote letters to members of Congress on behalf of the employees seeking help in getting the leave approved.

The activity filed a grievance under the parties' negotiated grievance procedure (NGP) claiming that the union's attempt to get congressional assistance for the employees in this matter violated the bargaining agreement. Management claimed that the NGP was the only method available to the workers for settling the problem.

In addition to the two incidents that were the subject of the grievance, the activity complained that the union published articles in its newspaper urging employees to write their congressional representatives regarding grievable matters. When employees write to members of Congress concerning work-related matters, the members, in turn, usually request information from the activity about the subject before answering the worker's letter.

To remedy the alleged agreement violation, the activity asked for reimbursement from AFGE for its expenses resulting from congressional inquiries. The activity wanted to deduct the amount from the dues it withheld from employees' salaries and paid to the union.

The activity noted that congressional correspondence had increased since the present union administration took office. According to management, this increase was a direct result of the union's urging and its intervention on behalf of employees.

The activity accused the union of encouraging workers both to file grievances and to write to their Congressional representatives concerning the same grievances or disputes. This was an effort to harass the activity by increasing its administrative workload.

In its answer to the members of Congress concerning the leave disputes, the activity said that it did not think the members should become involved because the matter should be resolved under the NGP. Management repeated its contention that the union's correspondence with Congress on this subject violated the negotiated contract.

The union maintained that in the past both individual employees and the union had written to members of Congress without objections by the activity. Earlier, employees had complained to Congress concerning management's performance appraisal system.

AFGE denied that it intended to harass management by the articles written in the union's newspaper. Rather, the articles encouraged employees to exercise their right to petition Congress under the Civil Service Reform Act (CSRA) and the First Amendment to the Constitution.

The union argued that it did not give up its right to seek help from members of Congress when it negotiated the agreement making the NGP the sole procedure for resolving grievances. Additionally, it did not attempt to urge the employees to bypass the NGP by encouraging them to write to Congress.

Further, the union claimed that the activity was guilty of an unfair labor practice (ULP) by its answers to congressional letters charging that the union violated the agreement, by removing the names of members of Congress from the bulletin board, and by filing the grievance in this case.

Issues: Did the union's letters to Congress and its encouragement of employees to write violate the agreement? If so, should the union reimburse the activity for its expenses in answering inquiries from Congress? Did the agency commit a ULP by its actions?

Award: Arbitrator Cary J. Williams denied the remedy requested by the activity. Although he found that the union had encouraged employees to write to Congress, he did not view this as an attempt to bypass the NGP or to harass management. The arbitrator accordingly held that the union's actions did not violate the agreement.

Although the labor-management relations provisions of the CSRA provide that the NGP is the only procedure for resolving issues within its coverage, Arbitrator Williams noted that the same law also affirms the right to petition Congress. He found that neither provision is superior to the other, but that both must be followed.

Notwithstanding the fact that the NGP and letters to Congress are both available to employees, the arbitrator emphasized that the NGP is the only method to obtain an enforceable remedy for grievances under its coverage. Members of Congress will answer letters they receive from employees and their union representatives. However, they will not act as a substitute for the NGP.

On this point the arbitrator quoted a Congressman's answer to one of the union's letters: "...[members of Congress] do not serve in an advocacy role in any Civil Service employee-employer disagreement. Our only involvement in such matters is to make certain that everyone is treated fairly according to the procedures that are provided by law and by regulation."

Concerning the union's ULP charge, Arbitrator Williams held that he had no authority to decide whether the activity's actions amounted to a violation. Nevertheless, he stated that he believed the activity acted in good faith when it answered congressional inquiries by stating that the disputes should be raised under the NGP.

(Warner Robins Air Logistics Center and American Federation of Government Employees, Local 987, June 14, 1985, LAIRS No. 16781) ■

The Labor-Management forum

Intent to Harm Not Shown

The Merit Systems Protection Board reverses the U.S. Marine Corps' removal of a fire fighter accused of "intentionally and deliberately" endangering the safety of other personnel during a training drill for a controlled oil fire.

The appellant claimed that twice during the drill he was ordered to "gate down," i.e., reduce the flow of water coming from his hose onto the cement pit fire. His contention was not supported by other testimony.

MSPB's presiding official upheld the removal, ruling that the employee intentionally reduced the water flow during the training session. The full Board overturned the initial decision. It found that the presiding official erred by not addressing the reason for the agency's removal action: the safety of other fire fighters.

MSPB also held that the agency failed to submit evidence of any danger to the safety of personnel. Management witnesses testified that training drills were routinely conducted to correct mistakes that might be made during actual emergencies. The drills were designed to improve fire fighters' performance.

The employer based its removal decision on the incorrect and unproven assumption that the appellant's behavior endangered the safety of personnel. So finding, the Board ordered that the removal decision be rescinded and back pay and benefits be given the appellant. (*Wyman v. U.S. Marine Corps*, MSPB Doc. No. SF07528510464, December 16, 1985) ■

Court Bars Agency's Attempt at End Run Around Arbitration Award

"We have little difficulty," the federal appeals court wrote, "in holding that the studied refusal of the U.S. Marshals Service to abide by a Federal Labor Relations Authority order enforcing a final arbitration award is an unfair labor practice." The court ordered the Service to comply with the order and to pay the union's attorney fees.

The case stemmed from the Service's 1978 unilateral change in duty tours for deputy marshals as a way to elimimate overtime. The arbitrator, basing his decision on contract provisions, ordered the former shifts reinstated until the Service fulfilled its obligation to bargain on the change with the American Federation of Government Employees.

When the Service filed an exception, the Authority dismissed its argument that the award violated management rights. The Service then went to court, but in 1983 the Ninth Circuit Court of Appeals rejected the agency's petition for review. The court held it had no jurisdiction to review FLRA arbitration determinations unless an unfair labor practice charge was involved or a party alleged that it had no duty to bargain on the issue.

When the Service still refused to obey the award, the union charged it with noncompliance. The Authority found the employer's refusal to be a ULP.

The Service made a second appeal to the Ninth Circuit, this time asking for review of the FLRA's finding that the employer was unfair. It asserted that for the court to review the ULP finding, the judges must also pass on the validity of the arbitration award underlying FLRA's order.

The court commented that "This roundabout way of obtaining appellate review of a nonreviewable arbitration award has little to recommend it in terms of judicial economy. It also flies in the face of legislative intent." (*Justice, U.S. Marshals Service v. FLRA, AFGE, intervenor*, USCA 9th Cir., Nos. 83-7973 and 84-7093, December 23, 1985. ■

MSPB Orders Employee Reinstated

The Merit Systems Protection Board upheld an initial decision reversing the appellant's firing by the Veterans Administration. The VA based the removal on charges that the employee publicly made false charges of criminal assault and battery against a supervisor.

The appellant had sued the supervisor in a state court for assault and battery, alleging that during a meeting the supervisor pushed him into a door. He claimed that his firing was in reprisal for the court suit, thus violating his First Amendment right to petition the government for redress of grievances. He also claimed discrimination.

The presiding official found that although the appellant's statements about the supervisor were incorrect, he actually believed he had been pushed. Accordingly, he lacked the necessary intent to lie to sustain a falsification charge.

She sustained the discrimination and reprisal charges, ruling that 5 USC 2302(b)(9) protected his filing of criminal charges. His filing, she said, was the motivating factor in his removal.

The full Board, however, noted that §2302(b)(9) has generally been applied only to employees appealing personnel actions and it did not apply to the appellant's court action. MSPB further held that the appellant's suit against the supervisor was not protected by the First Amendment since it did not deal with a matter of public concern.

MSPB relied on previous court decisions covering this issue, especially the test established in the Supreme Court's 1968 *Pickering* decision. The test requires balancing the interests of the employee, as a citizen, in commenting on matters of public concern, and of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

Under the *Pickering* test, the appellant's allegations about his supervisor were not a matter of public concern and therefore not protected. MSPB also found no indication that racial prejudice caused the agency to remove him.

Even though MSPB determined that the agency did not commit a prohibited personnel practice, it agreed with the presiding official that removal was unwarranted because of VA's inability to prove that the appellant's statements about his supervisor were intentional lies. (*Ledeaux v. VA*, MSPB Doc. No. BN07528510039, Dec. 9, 1985) ■

Innovative Ground Rules at Foreign Service

Three foreign affairs agencies and the two unions with which they bargain have reached agreement on an innovative set of ground rules for negotiations. The rules are being used for interagency bargaining on regulations of the State Department, Agency for International Development, and U.S. Information Agency.

Negotiations by these agencies are governed by the 1980 Foreign Service Act. The act mandates interagency bargaining on regulations governing personnel policies, practices and working conditions uniformly applicable to the foreign service. In practice, this coalition bargaining evolved into *ad hoc* negotiations and memoranda of agreement on individual topics rather than a basic bargaining agreement covering these issues in a single document.

As a result, the agencies negotiated almost nonstop with the American Foreign Service Association and Local 1812, American Federation of Government Employees. Since proposals were not linked and participants faced little time pressure to settle, negotiations consumed inordinate time—in one instance almost three years.

Under the September 1984 ground rules agreement, bargaining is now on a quarterly schedule rather than a rolling basis. For the first time the ground rules provide for package bargaining.

If bargaining and mediation are not completed within eight weeks, the parties are at impasse. And as an incentive for reasonableness in proposals and bargaining, the last best package offer becomes the final step in impasse settlement.

Management believes that the new ground rules are tailored to the unique interests and environment of the foreign service bargaining process. The result, it says, will be a more efficient and less time-consuming process. ■

Going to Pot

The Merit Systems Protection Board upholds the dismissal on drug charges of a mechanic helper at a Naval ordnance facility where explosives are stored. A drug detector dog had sniffed out marijuana in the appellant's truck in the parking lot, and a test revealed marijuana in his urine. The employee, who was disciplined previously on drug charges, admitted using marijuana daily for 14 years.

The employer charged the worker with reporting to duty under the influence of marijuana and with unauthorized possession of the drug on agency premises. The Board dismissed the first charge, but sustained the second.

A physician testified that a positive urine test did not necessarily mean the employee was unfit for duty that day. The appellant's supervisor said because the employee acted normally, he had no reason to suspect him of being "intoxicated." Given the circumstances, MSPB found that management failed to show that the appellant was unduly under the influence of drugs and thus unfit for duty.

The Board held, however, that possession of drugs on the premises was sufficient to uphold the dismissal. The Navy's table of penalties listed removal for a second drug offense.

Possession of marijuana at this type of facility was a serious offense, the Board said. Only a week before the incident management warned the appellant that a second drug offense could mean dismissal. Further, he showed no potential for rehabilitation, since at the first offense he asserted that he did not need treatment.

MSPB dismissed the employee's claim of handicap discrimination, noting that at the initial MSPB hearing he testified that he did not consider marijuana harmful or that he was handicapped or a drug abuser. Moreover, he had chosen not to enter a treatment program and was still using the drug.

Considering all these factors, the Board said, his "simple assertion now to the full Board that he is handicapped because of a drug problem is insufficient to prove his claim." (*Robertson v. Navy*, MSPB Doc. No. PHO7528510375, December 12, 1985) ■

Work Schedules Not Bargainable

Fort Bragg did not engage in an unfair labor practice when it refused to bargain over a union proposal requiring the fort to give advance notice of changes in work hours, the Federal Labor Relations Authority rules. FLRA accepted the Defense Department's argument that the proposal clashed with an Office of Personnel Management regulation.

Local 1770, AFGE maintained that the Authority made an about face from an earlier decision, *14 FLRA No. 52*, 1984. In the prior case the Authority found negotiable a union proposal similar to the Fort Bragg bid. There management argued unsuccessfully that the proposal would prevent it from acting at all, but did not raise the issue of whether it conflicted with a government-wide rule.

In the present case the Authority rejected the union's contention that its proposal to Fort Bragg did not conflict with the OPM regulation but instead was negotiable as "procedures" and "appropriate arrangements" under 5 USC 7106(b). This section authorizes bargaining on procedures and arrangements if the employer elects to negotiate.

The Authority found that section 7106(b) is not applicable where a proposal conflicts with a government-wide regulation as in this case. FLRA also dismissed arguments that the OPM regulation conflicted with law. (*20 FLRA No. 101*, December 11, 1985) ■

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Authority Issues Major Decision on Pay for Union Travel, Per Diem

In a key decision, the Federal Labor Relations Authority finds that a union proposal seeking agency payment of travel and per diem expenses incurred by employees using official time under various provisions of a negotiated agreement is negotiable.

FLRA said the National Treasury Employees Union bid concerned a working condition within the administrative discretion of the U.S.Customs Service. Further, the proposal was not inconsistent with law or regulation.

Until 1983, Authority policy required agencies to pay travel and per diem expenses of union negotiators on official time. That year the Supreme Court overturned the policy in its *Bureau of Alcohol, Tobacco and Firearms* decision.

In enacting the Federal Labor-Management Statute, the high court concluded, Congress did not intend that employees negotiating for a union were engaged in government business and thus automatically entitled to travel reimbursement. The court added in a footnote that federal unions could presumably negotiate for such payments as they do in the private sector.

The issue of whether reimbursements are negotiable in light of the Supreme Court decision came before FLRA on remand of this case from the D.C. Circuit Appeals Court. Customs had appealed FLRA's 1983 policy of automatic entitlement of these reimbursements, a finding rejected by the high court.

The Authority concluded that the proposal involved a condition of employment. Representation of employees in matters concerning their work, FLRA reasoned, affects their working conditions, and travel reimbursement is not proscribed by law.

FLRA also saw no conflict with government-wide travel regulations, since the U.S. Comptroller General had ruled that agencies are not barred from paying travel expenses of union representatives if this serves an agency's convenience or is otherwise in the government's interest. To the extent that case-by-case determinations are required by law and regulation, the proposal was not inconsistent with these procedures.

Agencies have discretion to make determinations on reimbursement, FLRA said. The Authority has consistently held that if an agency has discretion on a matter affecting working conditions, it must exercise that discretion through bargaining unless prohibited by law or regulations.

The Authority dismissed Custom's final argument that the proposal interfered with management's reserved right to determine its budget. Customs did not show that the proposal impacted on budget matters concerning determination of programs and operations, or that it would significantly increase costs.

The Departments of Justice and Treasury are closely studying FLRA's decision which could be appealed to the courts. (*21 FLRA No. 2*, January 31, 1986) ■

NEW Developments...

page

FLRA tells agencies to bargain on repayment of travel expenses for union representatives... 1

Special Counsel says majority of complaints allege prohibited personnel policies... 1

Arbitration Roundtable

Arbitrator rules on whether production standard in performance appraisal system violates law and labor agreement... 2

Union Convention Calendar 3

Agencies can order medical exams for employees receiving Workers' Compensation, Board says... 3

Court explains how performance standards should be communicated to worker... 4

Authority lists bargaining rights, duties in interagency transfers... 4

Special Counsel Reports on FY 85

In its Fiscal Year 1985 report the Office of Special Counsel (OSC) of the Merit Systems Protection Board advises that non-Hatch Act complaints of prohibited personnel practices and other violations of civil service law and regulations made up the bulk of cases it received in that year. These complaints amounted to over 84 percent of its total intake of 1,520 cases. Of the 1,520 cases, 239 appellants alleged reprisal for whistleblowing.

OSC's statutory mission is to protect the integrity of the merit system. It has three main responsibilities:

- Investigate prohibited personnel practices charges;
- Provide a secure channel through which claims of waste, fraud, mismanagement, etc., may be made without fear of retaliation or disclosure of identity;
- Enforce the Hatch Act.

The report notes that most of the complaints it receives are without merit. Moreover, after careful screening, OSC may decide not to prosecute because of insufficient evidence or inability to meet legal standards. Last year, the ratio of prosecutions to complaints exclusive of Hatch Act prosecutions, was about 0.7 percent. ■

PM 1.13:

ARBITRATION
roundtable
The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Meeting Production Standards

Casefacts: Some claims examiners at the Veterans Administration in St. Louis believed that their performance appraisal system, which had an 80 percent minimally acceptable production level, was inappropriately established. Local 2192, AFGE filed a grievance.

Under the system, examiners in effect competed against the average of other examiners in the unit. Those whose production average fell below the 80 percent floor were orally counseled. If their average had not risen above the floor at the next biweekly average, they got a written counseling. If there was still no rise at the next average, they had 90 days to comply with the minimum or their jobs were in jeopardy.

Federal regulations define a performance standard as the expressed measure of the level of achievement established by management for a position's duties and responsibilities. The VA-AFGE master agreement defines this standard as "a statement of requirements measuring various levels of achievement for critical and noncritical elements."

Both regulations and the contract require that performance standards be written and communicated to employees before the beginning of the appraisal period. The contract adds that this did not preclude modifications to the performance plan during the appraisal period. An employee could not be rated against these changes for a reasonable period of time.

The union argued that VA did not establish a written standard in accord with the agreement and regulations. Further, management never properly communicated the standard to examiners at the beginning of each appraisal period. The moving standard did not allow reasonable time between its setting and application.

While examiners must meet 80 percent of average production, they do not know what that average will be until the period is over, the union said. An employee could be acceptable at one period, and then increase his production but be below the minimum at the next rating.

The union maintained that the standard permitted a pre-established distribution of expected levels of performance in violation of regulations. AFGE drew upon the testimony of its expert witness, a statistics professor, who stated that the standard made possible a pre-established distribution system. However, he also said it was possible for every employee to meet the 80 percent average.

As a remedy, AFGE requested that use of the floating formula be ended. Two employees who were removed because of failure to meet the standard should be reinstated.

The employer argued that the appraisal system was not arbitrable. A change by an arbitration award would violate management's right to direct employees and assign work.

Moreover, the two workers who were removed had already appealed to the Merit Systems Protection Board which had sustained management's action. The matter was settled and could not be raised again.

VA asserted that the standard was established after meetings with employees who suggested the 80 percent figure. The figure remained constant, but the average changed as the workload was processed through different units. Under the new system, production increased and employees received more cash bonuses than before.

Management notified examiners of their production every two weeks so they knew what they accomplished over the previous year. The employer pointed out that when this same 80 percent standard was reviewed by MSPB, the Board upheld the standard.

Issue: Was the agency's method of evaluating the examiners' work a properly established and administered performance standard? If not, what was the remedy?

Award: Arbitrator Thomas J. Erbs, ruling on the threshhold issue, found the grievance to be arbitrable. However, the relief requested by AFGE could not result in his or the union writing the examiners' production standards, because this was an agency right.

He would not address the requested reinstatement of former employees unless the union met its burden of showing that the performance standard was inappropriate.

The arbitrator then denied the grievance. The union, he said, did not prove that the agency's actions violated law and regulations.

The main issue was whether the system adopted by VA was a performance standard. He concluded that it was, because it met both the contractual and regulatory definitions.

The standard was precise in requiring examiners to maintain a level of production which was 80 percent of the average. Employees knew that they would not be immediately disciplined for failing to meet the 80 percent, but instead would have a chance to comply over a substantial time period.

Arbitrator Erbs held that a standard which allowed employees to know where they fit in to overall productivity every two weeks was reasonable. This was more than most employees, even in the private sector, could expect.

He noted that MSPB had reviewed the same standard in two cases and found no showing that the standard was so arbitrary or unreasonable that its use caused improper measurement of production. Although he did not consider MSPB decisions absolutely binding, they had some precedential value despite AFGE's arguments to the contrary.

In the arbitrator's judgment, the examiners had enough time to meet the 80 percent floor when the standard was modified during the appraisal period. This met the reasonable time requirements of the law and contract.

Arbitrator Erbs said that the union's argument concerning a pre-established distribution of expected levels of performance was undercut by its own witness. (*VA and Local 2192, AFGE*, March 13, 1985, LAIRS No. 16583) ■

1986 Union Convention Calendar

A number of labor organizations with exclusive bargaining rights in federal agencies will be holding a national convention this year. The calendar lists the dates and locations of conventions scheduled for the remainder of 1986, excluding postal organizations. AFL-CIO affiliates appear in italics; all others are independent.

May

19 International Brotherhood of Teamsters
Las Vegas, Nevada

28 Professional Airways Systems Specialists
Las Vegas, Nevada

June

1 *Retail, Wholesale and Department Store Union*
Bal Harbour, Florida

9 *Hotel and Restaurant Employees International Union*
Chicago, Illinois

13 American Nurses Association
Anaheim, California

16 National Association of Planners, Estimators and Progressmen
Washington, D.C.

23 *American Federation of State, County and Municipal Employees*
Chicago, Illinois

July

1 National Education Association
Lousiville, Kentucky

27 *International Federation of Professional and Technical Engineers*
Bal Harbour, Florida

August

3 *International Association of Fire Fighters*
Las Vegas, Nevada

11 *American Federation of Government Employees*
Las Vegas, Nevada

September

Association of Civilian Technicians
(Date not yet determined)
Washington, D.C.

7 National Federation of Federal Employees
Las Vegas, Nevada

December

4 Patent Office Professionals Association
Arlington, Virginia

Note: Two unions, *Laborers International Union of North America* and *National Marine Engineers' Beneficial Association* will hold conventions this year, but the dates and locations are not available.

Agency Can Order Medical Exam for Employee Getting Workers' Compensation

The Merit Systems Protection Board rules that if an employee is receiving workers' compensation and the employer reasonably believes it has a position the employee can fill, the agency can order him to take a fitness-for-duty examination. The decision upheld a Veterans Administration determination to remove a worker for failure to show up for a scheduled examination.

The appellant was receiving workers' compensation for an injury on the job. The VA directed him to report for a medical exam to determine his medical qualifications for continued employment as an accountant. The letter warned that his absence adversely affected the office and that failure to report could result in separation.

When the appellant did not report for that exam and three others scheduled later, VA fired him. MSPB's presiding official sustained the removal, and the appellant appealed to the full Board.

The appellant contended that VA had no authority to order him to report for an examination and had not shown that the exam was to try to find a suitable position for him. He also argued, among other things, that his dismissal was in reprisal for having filed for workers' compensation.

The Board reviewed 5 CFR 339.301(c). Under this regulation, an agency may require an employee getting workers' compensation benefits to report for a medical exam when management has identified a position, including the employee's regular job, which it reasonably believes he can perform consistent with his medical limitations.

MSPB held that the regulation empowered VA to order the examination even though the appellant was receiving workers' compensation. The employer had notified him that the exam was to evaluate his ability to perform his current job. Moreover, there was no evidence that he was fired because he filed for the compensation. (*Abatecola v. VA*, MSPB Doc. No. SF07528510516, January 15, 1986) ■

Bargaining in Interagency Transfers

In a case involving interagency transfers and consequent bargaining obligations, the Federal Labor Relations Authority dismisses an unfair labor practice charge filed by Local 2782, AFGE against the Bureau of the Census. The decision explains the bargaining duties of the losing and gaining agencies.

The decision to transfer workers is a management right not subject to bargaining. However, before an intergency transfer goes into effect, the losing agency must notify the union representing affected employees and negotiate on the impact and implementation of the transfer.

Similarly, before the transfer takes place, the gaining agency must notify the exclusive representative of the bargaining unit into which the employees will be transferred. The gaining agency must give the union a chance to negotiate on the transfer's impact upon employees then in the unit.

After the transfer, the gaining agency has no bargaining duty unless it changes the transferees' working conditions, for example, by treating them differently from other unit employees. The gaining union has no right to initiate midterm negotiations on new matters. (*20 FLRA No. 104*, December 11, 1985) ■

Communicating Performance Standards

For the first time the U.S. Court of Appeals for the Federal Circuit addresses the important issue of when and how an agency must communicate a job's performance standards and critical elements to an employee against whom a performance-based removal or reduction-in-grade is being initiated under 5 USC Chapter 43.

The court ruled that an agency must communicate these elements and standards to an employee before the start of the appraisal period forming the basis of an adverse action. The decision sustained the Merit Systems Protection Board's ruling which upheld the Army's removal of the appellant when his performance failed to meet the critical elements.

The Army's performance appraisal system called for an appraisal period running from February 1 to January 31 of each year. Management communicated the elements and standards to the appellant for the first time in May 1982. The next month it gave him an unsatisfactory rating and a letter of counseling noting areas which needed improvement. The letter warned of adverse action if he failed to improve. In March 1983 management proposed to remove him.

The appellant argued that the Army failed to adequately communicate his standards within the time frame required by the Civil Service Reform Act. It did not inform him of the job's critical elements and standards *before* the start of the formal appraisal period.

What the appellant claimed, the court said, was that an employee is entitled to the same standards for one entire year and that a performance evaluation must cover no less than that entire year. The court relied on MSPB's 1984 *Cross v. Air Force* decision in rejecting this argument.

In *Cross*, the Board found that workers have a substantive right to be made aware of the critical elements and standards by which their performance will be evaluated *at the beginning of the appraisal period which forms the basis of the adverse action.*

Cross holds that for purposes of taking removal and demotion actions under Chapter 43, agencies must communicate elements and standards to the employee at or before the period forming the basis of the action, rather than being held strictly to the time specified in an agency appraisal system.

The court noted that under MSPB's interpretation, the substantative right to communication is not tied to an agency's officially designated appraisal period. When an agency is deciding whether to take adverse action, the employee's evaluation may encompass part of two official agency appraisal periods and may involve more than one standard, if a standard is changed.

The Federal Circuit affirmed MSPB's decision to uphold the appellant's removal. The Board based its decision on the incidents of deficient performance occurring after the May 1982 issuance of his elements and standards.

The court found that the Army's evaluation for the purpose of a Chapter 43 action was proper because the appellant was notified before the evaluation period began of the elements and standards. The period was long enough to give him ample opportunity to improve. (*Weirauch v. Army*, USCA Fed. Cir., Appeal No. 85-2290, January 30, 1986) ■

FLRA Reaffirms Initial Decision

Acting on court remand, the Federal Labor Relations Authority took another look at its earlier decision and came to the same conclusion—the union's unfair labor practice complaint against Scott Air Force Base should be dismissed.

In the original decision the Authority adopted the administrative law judge's recommendation that the Base was not unfair when its supervisor warned the president of Local R7-23, NAGE of disciplinary action if he did not devote more time to assigned duties and less to union representation. The District of Columbia Appeals Court ruled that the ALJ's findings did not support the dismissal, but there might be other valid reasons for the conclusion. (See *Consultant*, November 8, 1985)

After reconsideration, FLRA determined that the supervisor's warning was consistent with management's need for the work assigned to the president. Management sought a reasonable accommodation with him, and there was no evidence of animosity toward NAGE. (*20 FLRA No. 89*, November 27, 1985) ■

Consultant

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FLRA Lists Standards for "Appropriate Arrangements"

The Federal Labor Relations Authority issued its lead decision for cases involving the negotiability of union proposals containing "appropriate arrangements" for workers adversely affected by management's exercise of its rights under 5 USC § 7106(b)(3). The Authority says these proposals are negotiable unless the arrangements excessively interfere with management rights.

In determining whether there is excessive interference, the Authority will weigh the competing practical needs of employees and managers. This decision rejected the "direct interference" test FLRA had used in the past and instead adopted the approach taken by the District of Columbia Appeals Court in *AFGE v. FLRA*, 702 F. 2d. 1183, 1983.

To demonstrate a proposal is negotiable, a union must first show that it is an arrangement for employees adversely affected by management's exercise of its rights. The union must identify the rights producing the alleged adverse effects, the effects on workers, and how those effects are adverse. It must also show how its bid will address or compensate for the adverse effects.

Criteria for appropriate arrangements

FLRA listed five factors it will consider in weighing the needs of employees and managers.:

1) The nature and extent of the adverse impact of management's decision on workers;
2) The extent to which the adverse effects were within employees' control;
3) The nature and extent of the proposal's impact on management ability to deliberate and act, pursuant to management's statutory rights;
4) Whether the proposed arrangement had a negative impact on management rights disproportionate to the benefits to employees;
5) The proposal's effect on effective and efficient government.

List not all-inclusive

The Authority cautioned that these five factors are not all-inclusive. Rather, FLRA will consider all the facts and circumstances of a case and identify other appropriate factors. Parties should address relevant considerations as specifically and fully as possible.

The case stemmed from the National Association of Government Employees proposal requiring the Kansas Army National Guard, after deciding to fill a vacancy, to repromote by retention standing from among employees demoted during a reduction-in-force through no fault of their own. FLRA ordered the Guard to bargain on the proposal.

The Authority distinguished this case from an earlier case in which a similar repromotion provision was found to conflict with the Federal Personnel Manual. The FPM provision does not apply to National Guard technicians. (*21 FLRA No. 4*, February 7, 1986) ■

NEW Developments . . .

Criteria for appropriate arrangements covered in union proposals . . . 1
Postal Service offered reasonable accommodation to alcoholic worker . . . 1
Arbitration Roundtable 2
Were written reprimands issued two border patrol agents for just cause . . .? 2
Labor-Management FORUM 3
MSPB issues interim regulation on compliance with its orders . . . 3
Federal Circuit reverses arbitrator . . . 3
FSIP directs union to withdraw its compressed work schedule proposal . . . 4
Court holds Board has no authority over employee covered by contract . . . 4

Board Rejects Mitigation of Penalty

Overturning the decision of a presiding official (PO) who lessened the appellant's removal to a 20-day suspension, the Merit Systems Protection Board holds that mitigation of a penalty is inappropriate when the agency has provided reasonable accommodation to an employee and properly applied progressive discipline.

When the U.S. Postal Service fired a mail handler for leave-related problems, he asserted that he was discriminated against as a handicapped employee. Management had turned down his repeated requests for a shift change so he could receive alcoholism treatment.

The PO found that the agency had technical limitations on its ability to assign the appellant permanently to the day shift. Nevertheless, she noted the the employer failed to advise him of those limitations so he could seek other accommodations. She also found, based on the agency's refusal to acknowledge his handicap and shift requests or attempt other accommodation before removing him, that the removal penalty was unreasonable. *(Continued on page 4)*

Pm 1.13:

ARBITRATION
roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Things That Go "Bump" in the Night

Casefacts: The El Paso Border Patrol Sector, Immigration and Naturalization Service issued letters of reprimand to two border patrol agents who had been involved in a motor vehicle accident. Local 1929, American Federation of Government Employees filed a grievance claiming the agency failed to follow appropriate procedures and that the disciplinary action was not warranted under the parties' negotiated agreement.

The accident occurred while each agent was driving a vehicle on border patrol duty during a night shift between 6:00 p.m. and 2:00 a.m. At about midnight, Agent P contacted Agent A by radio and arranged a meeting between them at a nearby spice factory. Both agents were driving with their headlights turned off.

After calling Agent A, Agent P continued his patrol duties and saw another vehicle at the point of entry. He called Agent A again on the radio and told him about the vehicle he had seen. Agent P then continued to drive toward the spice factory.

As a result of the second radio call from Agent P, Agent A headed in the direction of the port of entry, thinking that the meeting at the spice factory had been called off. This maneuver placed the agents on the same road, driving toward each other. They collided in the darkness.

One vehicle sustained more than $4,000 worth of damages. The other vehicle was a total loss. Agent P suffered only minor injuries, while Agent A was hospitalized for a month after undergoing surgery.

The agency charged both employees with operating their vehicles in a negligent manner, causing injury to themselves and extensive damage to government property. Management gave each worker a written reprimand.

In its grievance over the disciplinary action the union argued that the agency failed to follow its policies and regulations by omitting certain information from the letter. Also, the formal written reprimand was too harsh as a disciplinary action because it was used to punish the employees rather than to correct them.

Further, AFGE claimed the agency had not properly trained border patrol agents to operate their vehicles in darkness. As another reason for setting aside the disciplinary action, the union said that no one told the employees about their right to have a union representative present when they made written statements concerning the accident.

The El Paso Border Patrol maintained that it reprimanded the agents for just and sufficient cause. The agency denied that it committed any procedural error that resulted in harm to the rights of the employees. It disagreed that the right to union representation under the negotiated agreement applied when employees made statements as a part of accident reports.

Management acknowledged the necessity for border patrol agents to drive with their headlights turned off while performing some types of duties. However, under those circumstances, agents should exercise increased caution and drive at reduced speed.

Issue: Were the written reprimands issued to the employees for just cause?

Award: Arbitrator Sanford Cohen reduced the disciplinary action for Agent A to an oral admonition. He held that the written reprimand given to Agent P was appropriate.

The arbitrator found that terms of the agreement were not clear enough for him to decide that employees are entitled to union representation when they are called upon to make official statements about accidents. However, he noted that the report in this case included nothing more than a bare account of the accident.

The statements of the agents did not contain any admissions against their rights or interests. The arbitrator, therefore, found no violation of the agreement by the fact that no agency official told the employees about union representation when they prepared their accident reports.

He found that management had committed a technical violation of its regulations and instructions by omitting some information from the disciplinary letter. However, the notices proposing the action did contain the information. Further, the employees signed the notices which indicated that they understood the content.

Arbitrator Cohen rejected the union's claim that a lack of night driving instruction contributed to the accident. He noted that night driving was a routine part of border patrol agents' duties. Agent P had ten years of experience with the border patrol. Agent A had eight years' experience. Both had performed their work in the past with few driving mishaps.

The arbitrator concluded that the primary cause of the accident was the uncertainty created by Agent P when he called Agent A about the sighting at the port of entry. Agent A thought that some kind of illegal activity was taking place and he started in that direction.

Under the circumstances it was reasonable for Agent A to assume that he should go to the port of entry instead of the spice factory. If not, why did Agent P make the call at all?

Agent P was not concerned about anything suspicious because he continued toward the prearranged meeting place. He did so without clarifying his intentions to Agent A concerning the second radio message.

The arbitrator did not find that the employees were willfully derelict in performing their jobs. However, they committed errors in judgment for which an oral admonishment for Agent A and a written reprimand for Agent P were appropriate. (*Immigration and Naturalization Service, El Paso Border Patrol and AFGE, National Border Patrol Council, Local 1929*, November 15, 1985, LAIRS No. 16974) ■

The Labor-Management forum

Faked Expense Account Justified Removal

The Merit Systems Protection Board sustains the Railroad Retirement Board's dismissal of an employee who submitted a fraudulent travel voucher. Mitigating factors introduced by the appellant did not carry enough weight to offset her removal, MSPB said.

The appellant submitted an expense voucher for lodging costs for herself and dependents while housed in temporary quarters. She admitted that she altered the rent receipt to show charges of $826.34 rather that the actual $526.34.

She contended that the removal was in reprisal for her sex discrimination complaint filed several years earlier. She also felt she should be excused because she was going through a divorce. Lastly, removal was too severe a penalty in light of her 20 years of service with a good record.

The Board found no evidence that the officials who proposed and decided on her dismissal were aware of the EEO complaint. The employee had acknowledged that her personal problems did not affect her work performance. And considering that she knew it was wrong to falsify a voucher, the penalty did not exceed the bounds of reasonableness. (*Hyatt v. RRB*, MSPB Doc. No. ATO7528510453, Dec. 5, 1985) ■

Court Reverses Arbitral Decision

The U.S. Federal Circuit Court of Appeals overturns an arbitrator's dismissal of a grievance as untimely filed. The court held that the postmark date on the appeal's transmittal envelope was the filing date, not the date the arbitrator received the appeal.

The grievant had been suspended for 20 days, from August 30 through September 27, by the Social Security Administration. SSA notified him that he could initiate an appeal through either the Merit Systems Protection Board or by filing a grievance under the negotiated grievance procedure within 20 days after the suspension's effective date.

Section 6 of the contract between SSA and the American Federation of Government Employees says "any grievance must be initiated no later than 20 days after the effective date of the action." Section 7 states that "proof of service shall be a return post office receipt executed by the person served..."

On September 19, the employee sent a grievance appeal letter to the arbitrator by certified mail. The arbitrator's return receipt was dated September 21.

The employer argued that the grievant filed too late. Although the cutoff date for the filing was September 19, the arbitrator did not receive the appeal until the 21st.

AFGE asserted that the employee filed timely on September 19. It pointed out that Federal Labor Relations Authority regulations specify that the date of filing is the date the appeal is deposited in the mail. And under MSPB rules, the postmark determines the date of filing an appeal.

The arbitrator held that the parties to the contract agreed in Section 7 that the proof of service was a return post office receipt. His return receipt was dated September 21, two days after the September 19 cutoff date.

The Federal Circuit, however, found the contract silent on the filing date when a grievance was sent by mail. Section 7 dealt with when an addressee *received* an appeal, not with the date the appeal was filed.

In interpreting a contract, the parties' intent should be considered. There was no direct evidence of what SSA and AFGE intended as the filing date of an arbitration appeal.

Had the employee appealed to MSPB, the filing date would be the postmark date. It was not logical to assume that the negotiators intended to fix a different filing date for an arbitration appeal. Further, the Supreme Court has ruled that Congress meant an arbitrator to apply the same substantive rules as MSPB in reviewing an agency's disciplinary decisions.

The court concluded that the negotiators intended the filing date of both arbitration and MSPB appeals, when sent by mail, to be the postmark date. The arbitrator erred, and the case now must be heard on its merits. (*Huey v. Health & Human Services*, USCA Fed. Cir., Appeal No. 85-915, February 5, 1986) ■

MSPB Issues Interim Rule on Enforcement of Its Final Orders

The Merit Systems Protection Board has issued an interim rule amending its procedures with respect to compliance and enforcement of Board orders. The revision clarifies MSPB's duty and authority in this area. It also emphasizes that responsibility of the parties in a case to assure that full compliance is obtained promptly.

The new rule will improve the process, MSPB explains. It will also shorten the time frame for the settlement and adjudication of disputes among the parties and the enforcement of a final Board decision.

The rule makes clear that parties are expected to cooperate with each other to assure that an order is obeyed promptly and in compliance with applicable laws, rules, and regulations. It recognizes that not all aspects of compliance can reasonably be ascertained and resolved immediately.

The rule directs the Board's resources and involvement in compliance matters to the issues in dispute. It provides an expedited procedure for the adjudication of those issues, and ultimately, when necessary, the enforcement of the final MSPB decision.

The rule appeared in the February 26, 1986 *Federal Register*, effective that date. Interested parties have until March 28 to file their comments. ■

Foreign Service Labor Relations Board Dismisses Exception to Award

The Foreign Service Labor Relations Board (FSLRB), noting its decisions must be consistent with those of the Federal Labor Relations Authority, dismisses a union assertion that the Foreign Service Grievance Board wrongly required it to meet the "clear and convincing evidence" standard of proof. This is FSLRB's first ruling on an exception to a Grievance Board arbitration award since the revision of the Foreign Service Act in 1980.

The American Foreign Service Association alleged that an employee was discriminated against because of his activities as union representative. The Grievance Board, finding no clear and convincing evidence to prove the union's claim, ruled in favor of management.

The union filed an exception to the award with FSLRB on the grounds that the proper standard was a "preponderance of evidence." FSLRB ruled that the Authority has repeatedly held that arbitrators, and therefore, the Grievance Board, may establish whatever standard they wish in the absence of standards of proof mandated by law or otherwise expressly prohibited. (*FS-AR-1*, January 31, 1986) ■

MSPB Lacks Jurisdiction Over Appellant Covered by Contract

The Federal Circuit Appeals Court, affirming a Merit Systems Protection Board decision, says the Board has no authority to handle an appeal of an employee covered by a bargaining agreement between the Army and the American Federation of Government Employees. The employee had appealed her reassignment caused by a reduction-in-force.

Under the Civil Service Reform Act, matters covered by a negotiated grievance procedure cannot be appealed to MSPB, with the exception of certain agency actions taken for misconduct and poor performance. An employee demoted by a RIF may appeal to the Board only if RIFs are excluded from the scope of the negotiated grievance procedure.

The Board concluded that the Army-AFGE agreement did not exclude RIF actions from being redressed under the grievance procedure. Accordingly, MSPB had no jurisdiction over her appeal.

The court concurred with the Board that the reassignment constituted a RIF matter generally subject to Board jurisdiction. It also agreed that because the negotiated grievance procedure covered RIF actions, the Board did not retain its customary appellate jurisdiction over an appeal from that action. (*Bonner v. MSPB*, USCA Fed. Cir., Appeal No. 85-2041, January 10, 1986) ■

Panel Orders Proposal for Compressed Work Schedule Withdrawn

Exercising its authority under the Flexible and Compressed Work Schedules Act, the Federal Service Impasses Panel orders Local 1776, AFGE to withdraw its proposal for a compressed work schedule. The Panel decided that the Williams Air Force Base had met its statutory burden of proving that the schedule was likely to have an adverse impact.

The union wanted a four-day workweek consisting of a ten-hour tour of duty each day. The proposal covered about 500 Wage Grade and General Schedule workers, but would also affect 6,000 military employees.

The employer contended that the schedule was not feasible, given its experience with a compressed work schedule in a 1980-81 experimental program. The experiment had adversely affected productivity and diminished the base's services.

Coverage for absent employees was often impossible when a position was occupied by only one person, and sometimes military personnel had to fill in. Area contractors had difficulty providing parts, supplies and services because of the unavailability of certain employees.

The schedule drastically reduced the availability of employees in the maintenance department, a 24-hour-a-day operation, thus delaying repairs and adversely affecting the flying schedule. The schedule also interfered with the engineering department's team concept of work assignment by causing difficulties in coordinating and scheduling.

Several departments ended their participation in the experiment ahead of schedule because of the adverse impact. The only departments reporting positive results employed so few civilians that their conclusions were not an accurate reflection of the basewide experience. Further, a four-day workweek at the base hospital would affect patient care because of the need for around-the-clock staffing.

The Panel concluded, for the reasons advanced by the activity, that the 4-10 schedule would have an adverse impact. (*Case No. 86 FSIP 3*, February 4, 1986) ■

[redacted]

Penalty Mitigation, *(Continued from page 1)*

The full Board, however, ruled that management tried to accommodate him through referral to various alcoholic programs which he refused to attend. In addition, the employer allowed him a year's leave without pay in which to receive treatment before ordering a psychiatric examination which showed he was able to work.

Given the employer's effort to accommodate, the Board said, the later disciplinary actions were not discriminatory or an improperly rapid acceleration of discipline. (*Gwynn v. U.S. Postal Service*, MSPB Doc. No. DEO7528410173, Dec. 12, 1985) ■

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Performance Standards Need Not Contain Time Targets, Numeric Measures

The U.S. Court of Appeals for the Federal Circuit sustains the Merit Systems Protection Board's determination that a foreman was deficient in performing two critical elements of his job. The court agreed with the Board that the Defense Logistics Agency proved its case by substantial evidence.

DLA standards for the foreman's position did not establish specific time targets or numeric measures, but instead used terms like "usually" and "most." MSPB held that the standards conformed with the statute, which requires only that an agency use objective criteria to the maximum extent feasible. The Board noted that work performance in this supervisory position could not be measured by a mechanical, judgment-free rating.

Evidence showed that the employer explained to the appellant what the standards were and what constituted unacceptable performance. His supervisor wrote memos to him about his work deficiencies and how he could improve, as well as answering his questions about his performance. The supervisor testified credibly regarding his subordinate's failure to meet standards.

After reviewing the evidence, the Federal Circuit rejected the presiding official's rigid quantification approach at the initial MSPB hearing. It concluded that "objective criteria" include the information set forth in the supervisor's written instructions, letters and memoranda to the appellant. (*Baker v. DLA*, USCA Fed. Cir., No. 85-2040, February 5, 1986) ■

FPM Bulletin on Attorney Fee Payment

An FPM bulletin issued recently by the Office of Personnel Management summarizes decisions involving attorney fee awards. OPM says that it is increasingly important for federal agencies to keep abreast of emerging case law and legal requirements in this area.

Several laws authorize an award of attorney fees to employees who, when challenging an agency action taken against them, prevail on appeal to the Merit Systems Protection Board, the Federal Labor Relations Authority or a federal court. When these awards are made, agencies must reimburse the appellants for legitimate expenses they incurred for their defense.

The bulletin describes 21 significant cases, with enough detail on the issues and holdings so that readers can quickly identify cases of potential interest. The table of contents is organized by topical headings. (*Summary of Selected Court and MSPB Decisions Involving Attorney Fee Awards*, FPM Bulletin No. 772-30, February 20, 1986) ■

NEW Developments...

page

Supervisor's performance could not be measured by deadlines, mechanical measures... 1

Employer should try to reassign handicapped worker before firing him... 1

Arbitration Roundtable
Employee pleads ignorance about marijuana found in her car... 2

Labor-Management FORUM
Defense study shows management's high success rate in exceptions to arbitration awards... 3

Brandishing gun at boss warranted removal... 3

New Executive Director at Authority... 4

Fifth Circuit holds left-handedness is not handicap under Rehabilitation Act... 4

Special Panel Says Agency Must Seek Reassignment for Handicapped Worker

A special panel holds that in making accommodations for handicapped federal employees, agencies *must* consider reassignment as an option. The panel adopted the Equal Employment Opportunity Commission ruling that the U.S. Postal Service discriminated against a letter carrier by firing him for physical inability to perform his job without first trying to reassign him.

The panel determined that EEOC correctly interpreted the Rehabilitation Act. The panel's decision overruled the Merit Systems Protection Board which had earlier upheld the Postal Service's action. MSPB must now direct the employer to reinstate the carrier with back pay.

The three-member panel was established to resolve conflicting decisions by the Board and EEOC in "mixed cases" involving a personnel action appealable to MSPB where the appellant also alleges that unlawful discrimination was a basis for the action. In these cases, an employee dissatisfied with an MSPB decision can appeal the Board's holding on discrimination issues to EEOC.

(Continued on page 4)

PM 1.13:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Possesion of a Controlled Substance

Casefacts: A sentry at the gate stopped a car driving into the Naval Air Rework Station in California for a routine identification check. The grievant and another employee were in the car. Although the car was registered in the grievant's name, she was a passenger and the co-worker was driving.

The sentry saw what appeared to be a portion of a marijuana cigarette and an alligator clip in the ashtray of the car. She then called a policeman who confiscated the alleged contrabrand material. When tested, the cigarette proved to be marijuana.

A civilian magistrate cited the grievant and the other employee with violating a California law by possessing a controlled substance, but the evidence provided in support of the criminal charge did not result in a conviction. The Naval station suspended her for three days on charges that her possession of the marijuana violated Navy rules.

The agency regulations state that possession of marijuana, narcotics or other controlled substances or drug paraphernalia on a military installation by a civilian employee normally requires disciplinary action, review of clearance eligibility, and referral for prosecution by appropriate civil law enforcement authorities.

The grievant claimed that she did not knowingly attempt to bring a controlled substance into the station. She was not in possession of the car until shortly before the incident at the gate.

That morning her ex-husband had called to say that he would turn the car over to her as part of their divorce settlement. She picked up the vehicle on her lunch break. It was when she was returning to the base from lunch that the sentry discovered the marijuana.

The grievant's union, Local 739, International Association of Machinists, argued that management had not proved that the substance found in the grievant's car was marijuana. IAM asserted that the test used by the police to determine whether the cigarette was a controlled substance was neither legal nor practical.

The union pointed out that Navy regulations provide that disciplinary action *may* be instituted for conviction of drug offenses by civilian authority where the required nexus is present. IAM contended that both regulations and the contract require management to drop its charges and rescind disciplinary action if civilian authorities find a worker not guilty of possession.

The employer maintained that its charge against the grievant was for just cause. Further, the charge was substantiated by a preponderance of the evidence.

The policeman testified on the incident at the entry gate. He described in detail the materials and methods used in testing the substance found in the grievant's car. A detective's testimony established that the test results were factual and official in nature. Police documents substantiated the test results.

The employer contended that the penalty was appropriate and consistent with command policy on drug abuse. The policy says that possession of illegal drugs or paraphernalia on a military installation "will normally result in a suspension." In management's judgment, the three-day suspension was the minimum corrective action necessary to impress upon the grievant the need to adhere to command policy and Navy regulations.

In response to the grievant's assertion that she did not knowingly attempt to bring a controlled substance unto the station, the agency maintained that as the registered owner and occupant of the car, she was responsible for its contents, regardless of whether she was aware of the presence of the marijuana.

It was Naval policy that such administrative actions as the suspension were wholly independent of a magistrate court decision. At one step of the grievance procedure management had written IAM that while the evidence in the criminal charge against the grievant did not result in her conviction, the evidence nevertheless supported the administrative burden of proof that a regulation was violated.

Issue: Was the three-day suspension of the grievant for just cause? If not, what was the appropriate remedy?

Award: Arbitrator Joe H. Henderson denied the grievance. He said he was unimpressed with the grievant's "alibi" that she was unaware of the substance in the ashtray.

If the sentry, who was standing outside the car window, was in a position to see the marijuana cigarette in the ashtray, the arbitrator felt certain that the grievant, as a passenger, should have been aware of its presence in the vehicle.

He rejected the union argument that the magistrate's dismissal of criminal proceedings against the grievant meant the employer must drop its charge. Disciplinary action by the activity, he said, was not contingent upon a conviction of the grievant by the civil authorities.

The employer was well within its rights to enforce rules and regulations independent of any criminal proceeding that may or may not have been initiated under California law by civilian authorities.

The arbitrator held that possession of a controlled substance on the station was sufficient cause for the employer to initiate disciplinary proceedings. The suspension was for just cause. (*Naval Air Rework Facility and Local 739, IAM,* April 3, 1985, LAIRS No. 16619)

Note: For a detailed examination of arbitration awards reviewing penalties for drug offenses, see *Alcohol and Drugs: Issues in the Workplace* by Denenberg & Denenberg, BNA Books, 1983, telephone (201) 225-1900. ■

The Labor-Management forum

Threatening Boss With Gun Justifies Dismissal, Board Rules

A motor vehicle operator who waved a gun at his supervisor and threatened to kill him lost his appeal to the Merit Systems Protection Board that he be reinstated. The Board held that the Veterans Administration's removal of the appellant was not too harsh a penalty.

Testimony by credible witnesses sustained the supervisor's account of the incident. Further, VA's deciding official properly considered the appellant's prior disciplinary record of a suspension and reprimand before imposing the removal. MSPB found that management proved its charges by a preponderance of evidence.

The Board determined that a nexus existed between the removal and the efficiency of the service because the appellant's violent threats had a detrimental effect on operations. In light of these factors, his 18 years of service did not support a finding that VA exceeded the bounds of reasonableness in imposing a removal. (*McGowan v. VA*, MSPB Doc. No. CHO7528510475, February 20, 1986) ■

Study of FLRA Decisions Involving Exceptions to Arbitral Awards

Last year a higher percent of agency-filed exceptions to arbitration awards caused the awards to be modified or set aside than did exceptions filed by unions.

In 1985 the Authority issued 215 decisions involving exceptions. One hundred and eight were filed by management, and 107 by unions. Management was successful, at least in part, in 78 of its cases (72.2 percent). Unions were successful in 1 case (0.9 percent).

The Department of Defense Study from which these figures are drawn notes that prior to 1985, agencies were successful in 30.9 percent of their cases and unions were successful in 2.4 percent of theirs.

Since enactment of the Civil Service Reform Act of 1978, the Authority has ruled on 963 exception cases. It sustained the awards in 566 cases (58.7 percent); modified or set aside the awards, at least in part, in 164 cases (17.1 percent); and determined 166 cases (17.3 percent) to be untimely filed. Other dispositive actions were involved in the remaining 54 cases (6.9 percent). A case involving both union and agency exceptions was counted as two cases.

Of the total 963 cases, 344 involved agency-filed exceptions, 609 union-filed exceptions, and 10 employee-filed exceptions. The Authority dismissed the employee-filed cases on the grounds that they had no standing to file exceptions. ■

Employee Can't Switch Midway from Grievance to Board Appeal

An employee who chose to appeal his dismissal through the negotiated grievance procedure cannot later change his mind and ask the Merit Systems Protection Board to hear his appeal, the U.S.Court of Appeals for the Federal Circuit holds. The court says the Board rightly dismissed his appeal for lack of jurisdiction.

When the General Services Administration fired the employee, he asked the union to represent him in the negotiated procedure. The union then acted on the employee's behalf a number of times, including his election of expedited arbitration and subsequent cancellation of arbitration.

The appellant contended that he did not personally elect arbitration and was not bound by the acts of his representative. The court held that since the employee had designated the union representative to act on his behalf and knew what the union official was doing, he was bound by the consequences of his representative's conduct.

The Civil Service Reform Act allows an employee to appeal certain adverse actions through either the negotiated grievance procedure or to MSPB. Since the appellant opted for the grievance procedure, the Board had no authority to handle his case. (*Whitaker v. MSPB*, USCA Fed. Cir., App. No. 85-2055, February 26, 1986) ■

Higher Standards for Law Enforcement Officials, MSPB Holds

The law enforcement duties of a postal inspector held him to a higher standard of ethical conduct than that of non-law enforcement personnel, the Merit Systems Protection Board decides. Consequently, the Postal Service was not unduly severe when it fired the employee for deliberately falsifying a travel voucher.

The employer emphasized the gravity of the appellant's offense. It also stressed that the falsification caused it to lose trust and confidence in his integrity, truthfulness and value as a government witness.

MSPB said the inspector's misconduct was similar to misconduct for which it has consistently upheld the removal penalty. Such mitigating factors as 18 years of satisfactory service and his remorse were not enough to compel the conclusion that removal was unreasonable. (*Gonzalez v. U.S. Postal Service*, MSPB Doc. No. NY07528510318, February 4, 1986) ■

Authority Names Executive Director

Last month the Federal Labor Relations Authority announced the appointment of Jacqueline R. Bradley as its Executive Director/Administrator. Her responsibilities include managing the agency's administrative operations and the case adjudication process.

Bradley had previously served as Special Assistant to FLRA Chairman Jerry L. Calhoun when he was the Acting Assistant Secretary of Defense for Force Management and Personnel. Earlier, at the Merit Systems Protection Board, she was Assistant Managing Director for Regional Operations, Regional Director in Denver, and Acting Regional Director in Seattle and New York. She has an A.B. degree from Immaculata College and a J.D. degree from Temple University School of Law. ■

Leftie's Not Right for "Handicapped Individual"

The U.S. Court of Appeals for the Fifth Circuit rules forthrightly that a left-handed federal employee does not qualify as a "handicapped individual" within the meaning of the Rehabilitation Act. The letter carrier argued that he was really fired because of his left-handedness, rather than for unsatisfactory performance during the probationary period as charged by his agency.

His superiors, he said, viewed his left-handedness as a handicap. They instructed him to use his right hand to finger and deliver mail because he looked awkward when he used his left.

The Fifth Circuit credited the carrier's evidence that his discharge was due to his left-handedness rather than slowness. Then, finding that left-handness is not an impairment as contemplated by the act, the court dismissed the case. The judges held that this is a physical characteristic, not a chronic illness or disability affecting a worker's health. (*De la Torres v. Bolger*, USCA 5th Cir., No. 85-1375, February 5, 1986) ■

AWOL Is Reasonable Cause for Removal

In the circumstances, the Merit Systems Protection Board rules, removal was a reasonable penalty for an employee with four unauthorized absences totaling 17 hours. The absences occurred shortly after the Defense Logistics Agency warned him that his pending removal was being held in abeyance to give him a chance to improve his attendance.

DLA initially proposed to fire the employee because of his six weeks' absence without leave. When his reply to the proposal referred to his treatment for "depression and work inhibition," the agency delayed his removal and put him on "probation" for a year. It notified him that if warranted, he could be fired before his probation ended. Several months later DLA removed him on the basis of four subsequent absences.

The appellant contended that management had indicated that it would overlook his six-weeks' AWOL so he could try to improve, but that DLA nevertheless unfairly relied on the lengthy absence predating its notice of probation. He also said he disagreed with the probationary period because he wanted leave on short notice to referee basketball games.

The Board found that in deciding to remove the appellant, the deciding official did not consider his six-weeks' absence. Further, the employee's potential for rehabilitation seemed slight. (*Banks v. DLA*, MSPB Doc. No. AT07528510288, December 9, 1985) ■

[redacted]

Reassignment, *(Continued from page 1)*

The panel's decision, the first it has made, was split two to one. Panel chairman Barbara Mahone, former chairman of the Federal Labor Relations Authority, and Clarence Thomas, chairman of EEOC, voted to defer to EEOC's interpretation of the Rehabilitation Act. Herbert Ellingwood, MSPB chairman, dissented.

The majority opinion relied heavily on the legislative history of the Civil Service Reform Act. It concluded that the act requires the special panel to give greater deference to EEOC than to the Board in interpretations of discrimination law, and greater weight to the Board in interpretations of civil service law. The opinion also listed standards of review the panel will use when reviewing cases referred to it by the Board.

According to the majority opinion, in this case the Board erred by finding that without a special requirement in the Rehabilitation Act, any obligation for an agency to reassign must be derived from civil service law. The Board also erred by finding that EEOC's decision incorrectly interpreted this act.

Board Chairman Ellingwood, in one of his final acts as head of MSPB, disagreed with other panel members on their majority decision and how they reached it. He called their opinion an "unworkable" decision-making model inconsistent with statutory requirements.

"Essentially, this panel has done little more than rubberstamp the Commission's erroneous administrative activism," Ellingwood said. "Congress rightfully expected more from the panel's deliberative process." (*Ignacio v. U.S. Postal Service*, MSPB Doc. No. SFO7528110438, EEOC Pet. No. 03840005, Special Panel No. 1, February 27, 1986) ■

Consultant

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Consultant

Board Rules on Mental Handicap Claims

The Merit Systems Protection Board finds that although the evidence supported the appellant's claim that she had a mental or emotional condition, she failed to prove that this was a handicapping condition and that she was a qualified handicapped employee. Accordingly, the employer did not discriminate against her because of a handicap.

The Army had fired the employee on eight counts of making false and malicious statements against her supervisor over a two-week period. During the seven months between the statements and her removal, the agency detailed her to a different job and office where she performed satisfactorily.

The Rehabilitation Act requires agencies to reasonably accommodate a handicapped employee who produces "convincing medical evidence" of an impairment limiting her major life activities. She must also show that she is a qualified handicapped employee who, with or without reasonable accommodation, can perform the essential functions of her job without endangering her own health or that of others.

The appellant's allergy specialist testified that medicine could have made her irritable and prompted her to say things about her supervisor. Her psychiatrist diagnosed her as suffering from paranoia, adding that she should not return to her former position because of her stressful relationship with the supervisor. He indicated that she could continue to function well in the lower-graded detail.

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The most economical way a federal agency can subscribe to the *Federal Labor-Management and Employee Relations Consultant* for FY 87 is to "ride" OPM's printing requisition to the Government Printing Office. This will save over half of the regular $28 subscription price.

Rider requisitions must be submitted to GPO through an agency's headquarters printing office, usually located in Washington, D.C. Field and regional offices should send a requisition to their agency printing office before June 20, 1986. *GPO will return all requisitions* sent directly from field or regional offices.

The headquarters office should complete an FY 87 requisition citing OPM's printing requisition No. 7-00034. The form should indicate the number of subscriptions on the consolidated order and where they should be sent.

To subscribe for the coming fiscal year, agency printing officers *must send rider requisitions to the Government Printing Office, Washington, D.C. 20402 before June 20, 1986.* ■

NEW Developments...

Two employees lose appeals based on claims that they suffer from mental handicaps... **1**

Arbitration Roundtable **2**
Worker tells arbitrator that Army activity failed to give him priority consideration...

Labor-Management FORUM **3**
OPM revises rules on Performance Management System.
GAO declines jurisdiction...

Bookshelf **4**
Court upholds general counsel's remedy in unfair practice case...

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DEPOSITORY

The psychiatrist at the appellant's fitness-for-duty examination concluded that she was paranoid, could become overtly psychotic, and could not presently function in her usual job. A psychologist involved with the exam said she was experiencing an incipient psychotic disorder.

The Board noted that the four medical reports did not establish that her condition was so severe as to substantially limit her ability to work or that any of her major life activities were impaired. "With such widely different opinions as to the appellant's condition," MSPB held, "it cannot be said that she suffered from a mental handicap."

The Board determined that the appellant's satisfactory performance in the detail indicated a high probability of rehabilitation. Dismissal was too severe, MSPB said, and it mitigated the removal to a 30-day suspension. (*Lehman v. Army*, MSPB Doc. No. AT07528410502, February 4, 1986)

In another case the appellant charged that the Army fired him without meeting its burden of accommodating his mental handicap. The Board, finding that he was not a qualified handicapped employee, dismissed his appeal.

The employer based its action on charges of absences without leave. The AWOLs had followed an extensive period of time during which the appellant was in leave-without-pay status.

The Board held that he failed to show that he could do the essential functions of his position without endangering the health and safety of himself or others, with or without reasonable accommodation, (*Hatcher v. Army*, MSPB Doc. No. AT07528110266-2, February 4, 1986) ■

PM 1.13:

ARBITRATION
roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Did Grievant Get Bona Fide Priority Consideration?

Casefacts: The case of the employee at the Savanna Army Depot in Illinois began several years before he filed this grievance. It stemmed from the settlement of his 1982 grievance which required that he receive one priority consideration for the next WC-4 Warehouse Worker vacancy.

A vacancy occurred in August 1984. The selecting foreman interviewed the grievant on the priority consideration referral. The grievant said that the interview lasted about half an hour, and he felt that it was a good interview.

The foreman said that in addition to the interview, he reviewed the grievant's personnel file for about 30 minutes and sought the opinion of the general foreman. The selecting foreman did not choose the grievant and instead requested a panel of other eligible employees.

The employee filed a grievance charging that he was not selected for the job because the foreman wanted a larger referral list—an improper reason for refusing an employee with priority consideration. He asked for a selection or non-selection based on his merit and that he be given the reasons for his non-selection in writing.

Local R7-36, National Association of Government Employees, contended that the foreman's actions were inconsistent with the purpose of a priority consideration. NAGE also asserted that during the grievance meetings the foreman stated that he needed a larger list of names from which to select in order to do his job as supervisor. The foreman and general foreman denied that this statement was made.

As a remedy for the foreman's failure to give the employee proper priority consideration, the union asked that the grievant be given a new priority consideration for the same or similar type or grade of job.

The activity's regulations provide that if an employee fails to receive proper consideration in a promotion action and an erroneous promotion is allowed to stand, the employee must be considered for the next appropriate vacancy to make up for the consideration he/she lost. An "appropriate vacancy" is one in which the employee has expressed interest and for which he/she is a high quality candidate. An employee is entitled to only one consideration.

The parties stipulated that since the grievant was a priority consideration referral, the foreman did not have to give any reasons for not selecting him. And because the parties were unable to agree on the issues, the arbitrator framed them.

Issues: What is a bona fide or good faith priority consideration? Did the grievant receive a bona fide consideration?

Award: Arbitrator Phyllis J. Senegal sustained the grievance. She ordered the employer to give the grievant one priority consideration for the WC-4 Warehouse Worker vacancy.

The arbitrator observed that, stated succinctly, a priority consideration was an opportunity for the agency to right a wrong. In this case, priority consideration required that management give the grievant an opportunity to present his qualifications for a job vacancy without competition from other employees.

The grievant was entitled to this opportunity because he did not receive proper consideration in 1982 when he applied for another vacancy. The lack of proper consideration was not due to any omission or error on his part.

In the arbitrator's opinion, priority consideration relieved the employer of the burden of vacating a position when the selection process went awry. She noted that a priority consideration was meaningless if it was not a genuine consideration of a candidate's qualifications prior to any request for a competitive candidate list.

The objective acts of the agency representative must reflect a good faith consideration of the employee's qualifications. The objective acts should not be tainted with ambiguity or deception.

A manager could do all the right things without ever intending to give the applicant a job. But this intent must be discoverable, that is, manifested by an objective act, before an arbitrator could hold that it tainted the priority consideration.

An example of a deceptive and less than good faith consideration, she said, would be if a manager's outward acts were faultless, but he told someone that he did not intend to select the applicant for reasons having nothing to do with the applicant's qualifications.

The foreman took three steps during his consideration of the grievant: he interviewed him, reviewed his personnel file, and sought the opinion of the general foreman. The question facing the arbitrator was what did the foreman do or fail to do that affected the priority consideration to such an extent that it could be fairly stated that the consideration was not genuine and the foreman did not act in good faith.

She credited the union's assertion that the foreman requested a larger list. This request clearly indicated a state of mind barring a good faith priority consideration. A supervisor who thought it an imposition to select employees three consecutive times from priority consideration referrals could be presumed to have not acted in good faith irrespective of his objective acts.

Arbitrator Senegal held that the foreman did not want to make his next selection for a vacancy from a priority consideration referral. Consequently, there was no genuine consideration of grievant's qualifications. (*Savanna Army Depot Activity and Local R7-36, NAGE,* September 26, 1985, LAIRS No. 16870) ■

New OPM Rules on Performance Management System

The Office of Personnel Management has updated its regulations implementing the Performance Management System (PMS) to make them more consistent with the Performance Management and Recognition System (PMRS) regulations.

While the PMRS regulations applied to managers and supervisors at grades GS-13 to 15, the new regulations apply to most other Prevailing Rate and General Schedule employees. They also modify and streamline the incentive awards program.

Agencies must submit their performance management plans to OPM for review and approval by June 9. Generally, OPM will approve each plan within 90 days of receipt.

An agency's plan will go into effect no later than 90 days after OPM's approval. Provisions of an agency plan become applicable to each employee at the beginning of the employee's next performance appraisal cycle.

The revised regulations became effective April 10, 1986. The regulations and OPM's discussion of why the changes were made appeared on pages 8396-8421 of the *Federal Register* of March 11, 1986.

The same issue of the *Register*, pages 8422-8425, contains proposed OPM regulations on other parts of the Performance Management System. These proposed rules would make PMS performance awards, recordkeeping, and performance appraisal administration more consistent with the revised regulations.

Both the revised regulations and the proposed regulations tie in with OPM's final rule on reduction-in-force published in the January 3 *Register*. The RIF rule gave greater recognition to performance as a retention factor. OPM said that it also strengthened the objectivity of the RIF process and improved the efficency of the system. ■

Bargaining on Uniforms at VA

A union proposal which would give warehouse workers at the Veterans Administration the option as to whether they will wear uniforms is not negotiable, the Federal Labor Relations Authority rules, because the purpose of the requirement is to allow VA to readily identify these workers in order to protect property.

The American Federation of Government Employees' bid conflicts with management's right to determine internal security practices, the Authority determined. It also clashes with VA's right to determine the methods and means of performing work.

Although declaring the issue out of bounds, the Authority rejected one of the employer's arguments. VA asserted unsuccessfully that it had no duty to bargain because the union agreed in a 1976 contract to limit the scope of bargaining to matters consistent with agency regulations.

Language put in a contract under an Executive Order, FLRA said, was not a voluntary yielding by the union of its right to bargain under the wider scope of bargaining allowed by the subsequently enacted 1978 Civil Service Reform Act.

AFGE made two other proposals which would establish the make-up of the uniforms and require the employer to provide safety shoes and rain gear. The Authority found these two negotiable since they concerned appropriate arrangements for employees adversely affected by VA's decision to require uniforms. (*21 FLRA No. 13*, March 14, 1986) ■

GAO Refuses to Consider Grievance Matter

The Comptroller General again declines jurisdiction in matters pending resolution in negotiated grievance proceedings if one party wants the dispute settled through arbitration and objects to a review by the General Accounting Office.

The Army had asked GAO whether a civilian employee could be held financially liable for allegedly fraudulent travel claims. The grievant and the National Federation of Federal Employees protested that a GAO review would improperly interfere with ongoing grievance proceedings.

The Comptroller General noted that under the Civil Service Reform Act, the Federal Labor Relations Authority—not GAO—reviews arbitration awards. GAO regulations explain when it will rule on expenditures of mutual concern to agencies and unions.

GAO will not review a final and binding arbitration award. It will not comment on a matter subject to grievance procedures and within Authority jurisdiction, or if GAO's assertion of jurisdiction would disrupt the grievance and arbitration process. (*GAO No. B-220119*, December 9, 1985) ■

Negotiability of Awards

The Commodity Futures Trading Commission cannot bargain over a union proposal establishing a range of awards in terms of percentage of salary for superior or outstanding performance, the Federal Labor Relations Authority decides. The proposal would interfere with management's right to direct employees and assign work, but not with its right to determine its budget.

Additional Local 3477, AFGE proposals, however, which set a minimum cash award for adopted suggestions and a percentage formula for determining the size of the awards, are not negotiable. The Authority said these proposals set the size of the awards if they are granted, but do not require that they be granted. (*21 FLRA No. 18.*, March 20, 1986) ■

bookshelf

The Office of Personnel Management has issued two publications which provide assistance to negotiators and researchers in federal sector labor relations.

The first, *Negotiability Determinations by the Federal Labor Relations Authority, 1979 to 1985*, is a handy reference to FLRA decisions on bargaining proposals, with leads for further research. (88 pages, July 1985, available from the National Technical Information Service, Department of Commerce, Springfield, VA 22161, telephone 703/487-4650, Order No. PB86-169430, at $16.95 plus $3.00 for handling.

The other OPM publication is *A Survey of Assignment and Scheduling Provisions in Federal Labor Agreements*. It contains negotiated clauses on assignment to shifts, duty tours, overtime, rest breaks, etc. Scheduling provisions cover specific job hours and start and stop times. (33 pages, December 1985, available from National Technical Information Service, address above, Order No. PB86-169430, at $9.95 for a paper copy and $5.95 for microfiche.

* * * *

Last year the fourth edition of *How Arbitration Works* by Elkouri and Elkouri was published by BNA Books. This book is *the* definitive study of the principles and practices of arbitration. First published in 1952, *How Arbitration Works* has long been considered the standard text on arbitration by industrial relations managers, union representatives, labor attorneys, arbitrators and students.

The fourth edition is updated to provide an understanding of the increasingly prominent role of Congress and the courts in the field of labor-management disputes. The coverage includes bargaining and dispute resolution in state and federal public sectors.

The 900-page book may be ordered from BNA Books Distribution Center, 300 Raritan Center Parkway, C.N. 94, Edison, NJ 08818, telephone 201/225-1900 at $65.00 a copy. ■

Court Questions FLRA Practice Regarding Status Quo Remedies

A federal appeals court sustains a decision by the General Counsel of the Federal Labor Relations Authority to accept an informal settlement of a union's unfair labor practice complaint. The General Counsel had agreed with the FLRA regional director that the informal settlement agreement—which did not call for full *status quo ante* relief or back pay—was an adequate remedy. The court, however, counsels FLRA in handling future cases involving retroactive claims.

Budget cuts caused the Equal Employment Opportunity Commission to freeze hiring and promotions. The agency turned down a request by the American Federation of Government Employees to bargain over the impact and implementation of the promotion freeze.

When AFGE filed a ULP complaint, the regional director approved a settlement agreement over the union's objections. The agreement required the agency to post notices that it would not again unilaterally change employment terms without giving AFGE a chance to bargain on the changes' impact and procedures.

The union protested that the agreement did not grant its requested roll back relief of retroactive promotions and back pay. The regional director, however, decided that this remedy was not appropriate because the budget cuts necessitated the freeze. Returning to the original situation would execessively disrupt the efficiency and effectiveness of EEOC operations.

The U.S. Court of Appeals for the District of Columbia rejected the union's challenge of the settlement agreement. Noting the existence of some relevant National Labor Relations Board precedent and the absence of judicial guidance, the court held that the Authority's decision was not arbitrary or capricious.

The D.C. Circuit warned that in the future it would not accept FLRA's general argument that imposition of budget cuts, coupled with a claim that disruption would result from *status quo ante* relief, was generally a legitimate reason for the Authority to exercise its discretion to deny back pay. (*AFGE v. FLRA*, USCA D.C. Cir., No. 85-1004, March 11, 1986) ■

New Member of FSLRB

Jerry L. Calhoun, Chairman of the Federal Labor Relations Authority, has appointed Mrs. Tia Schneider Denenberg as a member of the Foreign Service Labor Relations Board (FSLRB). The chairman of the Authority also serves as chairman of the Board. FSLRB administers the conduct of elections and resolution of labor management disputes as they relate to foreign service personnel.

Denenberg has experience as an arbitrator, teacher, and author of several publications concerning labor relations. She has a B.S. from the School of Industrial and Labor Relations, Cornell University, and has done graduate studies at the University of Cambridge. ■

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Consultant

MAY 19 1986
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DEPOSITORY ITEM

President Nominates Authority Member

President Reagan has announced that he is reappointing Henry B. Frazier III as member of the Federal Labor Relations Authority to a five-year term expiring July 1, 1990. The appointment must be confirmed by the Senate.

Frazier has been a member of FLRA since its inception in 1979, and last year served as acting chairman. He was formerly chairman of the Federal Labor Relations Council, the Authority's predecessor. He has a B.A. from the University of Virginia, J.D. from George Washington University Law School, and LL.M. from the Georgetown University Graduate Law Center. ■

Court Says SSA Must Release Employee Addresses to Union

The Federal Appeals Court for the Second Circuit holds that the Federal Labor Relations Authority wrongly dismissed a union charge that the Social Security Administration unfairly refused to give it the names and home addresses of bargaining unit members. The Authority had set aside the findings of an administrative law judge who ruled in the union's favor.

The ALJ said the addresses were crucial to the ability of Local 1760, AFGE, to frame proposals for bargaining. Other means of communication open to the union, such as bulletin boards, off-duty solicitation and quarterly newsletters, were inadequate. He also observed that only 40 hours of agency time were needed to provide the data.

In overruling its ALJ, the Authority concluded that the Privacy Act forbids release of this information. The release was only a trifling benefit to the public interest, and the strong privacy interest of workers in their home addresses outweighed AFGE's need for disclosure.

The Second Circuit said that it normally deferred to the Authority's interpretation of the labor relations statute. Here, however, the Authority had interpreted the Privacy Act, a statute outside of FLRA expertise.

In the court's judgment, the privacy interest of the average employee in his address was not compelling. Moreover, in private sector cases the court did not regard the mere existence of alternatives as sufficient to justify the refusal to release addresses.

The Authority and SSA, as intervenor, were unable to convince the court that the union sought the information merely to solicit membership. The Second Circuit said their arguments labelling AFGE's interest "proprietary" sought to denigrate the union's role.

The court pointed out that Congress had determined that collective bargaining in federal employment was in the public interest. A union, as the exclusive bargaining agent, must communicate with workers it represents.

Since the ALJ found that the other means of communication were inadequate, the court ruled that the release of the data was not prohibited by law. It remanded the case to the Authority for an order consistent with that of the ALJ. (*AFGE, Local 1760 v. FLRA; SSA and Dept. of Health and Human Services, Intervenors*, USCA Second Cir., Doc. No. 85-4144, March 24, 1986) ■

OPM Guidance on Short-Term Furloughs

The Office of Personnel Management's Workforce Effectiveness and Development Group has sent agency personnel directors guidance on how to take short-term furlough actions. OPM issued the guidance because some agencies reported that due to budget restrictions, they were exploring ways to cut costs, including the use of short-term furloughs.

Short-term furloughs may last as long as 30 calendar days (22 workdays). They may run on consecutive days or on intermittent days, such as one workday per week for 15 weeks.

The following information is among the do's and don't's contained in OPM's March 18 guidance.

(Continued on page 4)

NEW Developments...

page
Court upholds union's right to home addresses of employees... **1**
OPM guidance for agencies considering furloughs...

Arbitration Roundtable
Agency grieves that union sought remedies outside the negotiated grievance procedure... **2**

Labor-Management FORUM
Board holds alcoholic employee with long sober spells not eligible for disability retirement... **3**
Arbitration awards on travel, per diem payment...

Authority emphasizes that arbitrators must give fully articulated reasons when issuing attorney fee awards... **4**

PM 1.13:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

When Exclusive Is Not

Casefacts: Officials of the Department of Defense Dependent Schools filed a grievance claiming that the Overseas Federation of Teachers violated the negotiated agreement by the way it handled two complaints raised by teachers it represents. The agency said that the negotiated grievance procedure (NGP) was the only method available to the union to resolve the issues. Accordingly, the union should not have taken other steps outside the NGP to seek remedies in the disputes.

Management's grievance was based on events involving teachers assigned to schools for U.S. dependents in Spain. In the first incident the agency notified a teacher that he would be released in a RIF (reduction in force). Soon after, the agency received letters from employees suggesting that it transfer the teacher to another school as an alternative. Other mail pointed out that the employee also served a safety specialist at the military installation and that his wife worked for the security unit at the same activity.

The agency contended that the teacher, who was also a union official, urged other employees in the unit to intervene on his behalf. According to the agency, these efforts violated the agreement because the union could have filed a grievance concerning the employee's treatment in the RIF. Management argued that under the law the grievance procedure was the exclusive means to resolve the dispute.

The second occurrence involved another teacher who had been excluded from the military base by the government of Spain. Management placed the teacher on leave without pay (LWOP) pending the outcome of official dealings with the host government concerning her status.

The union initiated a formal grievance over the matter. In addition, union officers protested the situation in mail sent to U.S. government officials and a newspaper. They also suggested that individual unit members write similar letters in support of the teacher.

The agency claimed that this letter writing campaign violated the agreement which specifies that the NGP is the sole procedure for resolving the questions raised concerning this matter. Further, management maintained that the union's actions were not warranted because the grievance procedure requires that the parties attempt to settle disputes at the lowest possible level within the agency.

The union contended that the term "exclusive procedure" means only that the NGP must be used instead of other grievance or appeal procedures. The agency may not impose any meaning that would deny employees their rights under the law or the Constitution. The union maintained that the teachers it represents do not have to use the grievance procedure as the only means to express their dissatisfactions concerning working conditions.

Issue: Did the union violate the law and the agreement by the actions it took on behalf of the teachers?

Award: Arbitrator Thomas F. Carey sustained only a part of the agency's grievance. He noted that the legislative history of the law and the parties' agreement failed to fully support the respective positions of either the agency or the union. However, the arbitrator affirmed the union's claim that nothing in the statute or the agreement may be interpreted to curb employees' rights concerning matters outside of the grievance procedure, including the right of individuals under the Constitution to speak freely.

He found that the statute which sets forth the NGP as the exclusive procedure for resolving disputes also specifies certain exceptions from its coverage. The law also allows a grievant to select alternate procedures in appropriate circumstances. Additionally, Arbitrator Carey found that under the terms of the agreement the coverage of the NGP is limited to affairs within the control of the agency. Thus, the exclusive nature of the NGP is not absolute.

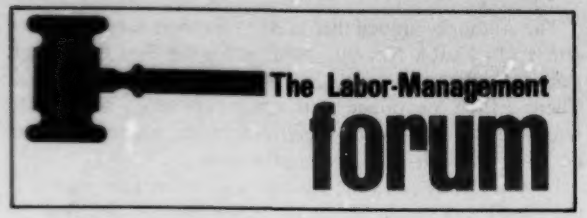
On the basis of his findings, the arbitrator held that the union's actions in response to the RIF did not violate the agreement. The evidence showed that most of the letters received by the agency focused on the fact that the base would lose the other services of the teacher and his wife if the RIF took place as planned. Therefore, he concluded that the evidence did not support the agency's charge that the union attempted to bypass the grievance procedure to settle the RIF question itself.

Arbitrator Carey noted that there were two distinct aspects of the union's activities in reaction to the barring of the teacher from the base. First, the union sought outside influence as well as assistance from its membership concerning the action of the Spanish government. Secondly, the union solicited the same kind of help in connection with the agency's decision to place the employee on unpaid leave.

The arbitrator held that the questions concerning Spain's exclusion of the teacher were not matters subject to the grievance procedure because the issue was not within the control of the agency. Therefore, the union's efforts on behalf of the teacher were not contrary to the agreement.

However, the arbitrator held that the decision of the agency to place the employee in a LWOP status was a matter within the scope of the NGP. In fact, a grievance over the issue was pending resolution under the procedure. Therefore, the union's attempts to use remedies outside the grievance procedure constituted a violation of the agreement provisions which make that the exclusive procedure for settling the dispute.

He required the union to inform its leaders that they must use the NGP where appropriate and refrain from seeking other solutions while formal grievances were pending. (*Overseas Federation of Teachers and Department of Defense Dependent Schools, Mediterranean Region*, May 31, 1985, LAIRS No. 16777) ■



Fired Alcoholic Employee Not Eligible for Disability Retirement

An alcoholic employee capable of maintaining long periods of sobriety was not disabled by his alcoholism and thus was not eligible for disability retirement, the Merit Systems Protection Board rules.

The case concerned a Federal Aviation Administration technician fired for breach of the employer-employee relationship due to continued alcohol abuse and failure to rehabilitate himself. He applied to the Office of Personnel Management for disability retirement benefits, asserting that due to his alcoholism he was unable to perform his duties on a reliable basis. OPM denied the application since he did not prove that his medical condition would remain disabling for at least one year.

The Board explained that under the law, in order to receive an annuity, the appellant must show that:

1) Because of disease or injury he was unable to render useful and efficient service in his position, and
2) The condition would continue for at least a year, and
3) He was not qualified for reassignment to a vacant position at the same grade or level.

MSPB found that he had had long periods of sobriety in the past. He had, in fact, been sober for six months before his application for disability retirement. He did not show that he could not remain sober for the next year. Further, there was no evidence of physical damage, such as liver damage, from alcoholism.

The Board added that there was nothing about his alcoholism which kept him from going to work and at the same time participating in a treatment program. Under OPM policy, disability retirement will not be approved when the medical condition persists because the employee will not seek treatment.

In a split decision, the Board upheld OPM's denial of disability retirement. Member Devaney dissented, with his opinion to follow later. (*Winslett v. OPM*, MSPB Doc. No. AT831L8510586, March 25, 1986) ■

Impact of Debt Collection Act on Negotiations

Doing an about-face on its original position in two cases, the Federal Labor Relations Authority rules that union proposals which would bar agencies from charging interest on delinquent unused travel advances are not negotiable. The Authority held that the proposals conflicted with the Debt Collection Act of 1982.

The proposals were made by the National Federation of Federal Employees to the U.S. Army Engineer District in Kansas City, Missouri, and the Army Garrison in Yongsan, Korea. Both bids asked that there be no late payment charges if an employee was tardy in repaying a travel advance which he did not utilize.

In 1982 the Authority found no conflict between the proposals and federal claims collection standards and Treasury requirements. However, before FLRA issued its decision but after the parties filed their submissions, Congress enacted the debt law.

Upon the Army's motions for reconsideration, FLRA reexamined the issue in light of the new statute. The union maintained that the proposals were within management's duty to bargain, because, in NFFE's interpretation, the act authorizes an agency to waive the collection of interest and late payment charges.

The law was intended to facilitate the collection of debts owed the government, FLRA noted, and it provided that an agency *must* assess a delinquent payer for handling charges and interest. Accordingly, the proposals were inconsistent with the Debt Collection Act. (*21 FLRA No. 20*, March 20, 1986) ■

Travel Regulations Determinant, Authority Rules

When it ruled recently on exceptions to two arbitration awards ordering payment of travel expenses incurred by union representatives on official time, the Federal Labor Relations Authority emphasized that such awards must comply with federal travel regulations.

The Authority also relied on its key decision on payment for union travel and per diem, *NTEU v. U.S. Customs Service*, 21 FLRA 2, 1986. (See *Consultant*, February 28)

In the first case the Authority modified the award which held that the labor agreement between the Social Security Administration and Local 3369, AFGE, entitled the union president to travel and per diem expenses. The $116.00 in expenses were incurred during his one-day trip to Washington, D.C., to visit union officials and Congress.

Although the Authority sustained the arbitrator's finding that payment was due the AFGE official, it faulted the award's silence on applicability of federal travel regulations. These regulations require agencies to authorize payment of expenses *only* for those duties conforming to regulatory requirements and restrictions.

So ruling, the Authority modified the award to provide payment "insofar as consistent" with applicable travel regulations. (*FLRA No. 23*, March 25, 1986.)

In the second case, the Authority sustained an award granting travel and per diem payment to a union official because the award did not conflict with legal requirements or the negotiated agreement. FLRA said the arbitrator rightly ruled that under a negotiated agreement revision the General Services Administration must pay these expenses for labor-management activities which were consistent with the contract and with federal travel regulations. (*21 FLRA 24*, March 25, 1986) ■

Arbitrators Must Give "Fully Reasoned" Decision in Fee Awards

Reversing an earlier decision, the Federal Labor Relations Authority remands an award to an arbitrator who ordered the Federal Aviation Administration to pay the grievant's attorney fees but failed to fully explain the reasons for the fee award. Instead he simply cited Back Pay Act provisions and said they were met.

In its initial decision, the Authority set aside the award. Although it subsequently agreed to reconsider the initial ruling, FLRA warned that in the future it will set aside or modify awards granting attorney fees if arbitrators do not spell out their findings.

The National Association of Air Traffic Specialists asked the Authority to take a second look at its original decision. The union reminded the Authority that in similar earlier cases FLRA had remanded each case to the parties so they could seek complete clarification from the arbitrator, rather than reversing the award as it did here.

The Authority argued that in *Army Support Command and IBEW*, 14 FLRA No. 90, 1984, it for the first time listed standards arbitrators must apply when awarding attorney fees. There FLRA cautioned that arbitrators must issue fully reasoned decisions with specific findings supporting their decision on each statutory requirement.

In subsequent cases the Authority remanded the matter if the award was issued before the *Army Support* decision. In this *FAA* case, however, the parties and the arbitrator had the benefit of the earlier case, and FLRA therefore initially overturned the award.

On reconsideration, FLRA acknowledged that it had not explicitly apprised arbitrators and parties in the 1984 decision that it would set aside attorney fee awards lacking fully supported reasons. Nor did it notify parties of their responsibility and interest that arbitrators make the necessary determinations.

In these specific circumstances, the Authority made an exception and reconsidered its setting aside of the award. FLRA sent the case back to the parties so they could ask the arbitrator to clarify and interpret his attorney fee award on all statutory requirements. (*21 FLRA No. 26,* March 25, 1986) ■

Furloughs, *(Continued from page 1)*

Q. What procedural rights apply to employees subject to short-term furloughs?

A. An agency must give employees 30 days' advance written notice listing the specific reasons for its proposed furlough action. Employees have at least seven days to answer orally and in writing and to furnish documentary evidence supporting their answers. They may be represented by an attorney or other representative.

The agency must then issue a written decision with the specific reasons for its action at the earliest practicable time. Eligible employees may elect to appeal to the Merit Systems Protection Board or grieve if they are covered by a negotiated grievance procedure.

If the agency is furloughing some but not all employees in a competitive level, the notice of the proposed action must state the basis for selecting the particular employee and the reasons for the furlough.

Q. Can employees use leave without pay (LWOP) in place of furlough? How about annual or sick leave?

A. Agencies may allow employees to select days of LWOP instead of furlough days. LWOP would be a non-pay status and accomplish the same cost savings. Annual or sick leave is not appropriate if the furlough is for lack of funds because the workers would be in a pay status, contrary to the intent of the furlough.

Q. May employees take other jobs while on furlough?

A. Yes, they can accept temporary appointments at another agency or jobs outside the federal system. They must obtain approval of the outside employment, and the jobs cannot violate conflict-of-interest restrictions or the Hatch Act.

Q. Are employees entitled to unemployment compensation while on furlough?

A. Employees may possibly be eligible for unemployment compensation, especially if they are on consecutive furlough days. State compensation requirements differ, and agencies and workers should submit their questions to the appropriate state office.

Q. How does a furlough affect an employee's health and life insurance benefits?

A. Enrollment for health benefits continues for 365 days for employees in a nonpay status. The government contribution continues during the nonpay status, and employees are liable for payment of their share of the enrollment costs.

Enrollment for life insurance continues for 12 consecutive months for employees in a nonpay status without cost to employees or their agency.

The guidance memo covers other aspects of short furloughs, including sample notices of furlough action. *Readers interested in obtaining a copy of the OPM guidance should contact their agency's personnel director.*

For the labor relations aspects of furloughs, contact Part 752, Adverse Actions, contact OPM's appellate Policies Division, 202/653-8551.

For information on leave, pay, retirement, health benefits and life insurance, contact OPM's Office of Pay and Benefits Policy, Advisory Services Division, 202/632-5582 or 632-5584.

For labor relations aspects of furloughs, contact OPM's OPM's Technical Guidance and Information Division on 202/632-5580.

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FLRA Clarifies Standards for Attorney Fee Awards

MAY 2 1986
U. S. GOVT. PUBS.
DEPOSITORY

The Federal Labor Relations Authority has issued a major decision involving awards of attorney fees by arbitrators under the Back Pay Act. In a case concerning hazardous duty pay for Naval workers exposed to asbestos, FLRA upheld the arbitrator's attorney fee award.

Authority Chairman Calhoun and Member Frazier wrote lengthy, separate, concurring opinions. They explained the Back Pay Act standards which arbitrators must meet before granting legal fees.

One requirement is that fee awards must be "warranted in the interest of justice," and the two opinions provide guidance to advocates and arbitrators in applying this standard. The members again stressed the requirement for a fully articulated, reasoned arbitral decision with specific findings to support the determination on each statutory requirement.

Both opinions refused to sanction an arbitrator's incorporation by reference of the arguments of a party's counsel as justification for a finding of an award of fees. A fully articulated decision requires independent, objective analysis and conclusion. "A cursory statement that the arbitrator considered the necessary elements of analysis does not meet this test," Calhoun wrote.

Under the act, fees are awarded only to the prevailing party. Calhoun noted that the party need not prevail on all issues if it has won on "a significant, separable claim on the merits." Frazier pointed out that to be awarded fees, the grievant must not only prevail—he or she must also be awarded back pay.

In discussing the reasonable fee requirement, Calhoun found acceptable the use of the "lodestar" method. (The lodestar method means the attorney's customary billing rate is multiplied by the number of hours reasonably devoted to the case.) Where the fees will ultimately be received by a union, he said, actual expenses must be used to compute the amount. (*21 FLRA No. 25*, March 25, 1986) ■

NEW Developments . . .

page

Major Authority ruling on arbitration award standards for attorney fees . . . **1**

High court lets stand lower court decisions on performance-based actions . . . **1**

Arbitration Roundtable
Did management have on obligation to meet with the AFGE official wearing a union shirt? . . . **2**

Map of FLRA *regional structure with addresses, phone number . . .* **3**

President *nominates new Authority member . . .* **4**

MSPB *mitigates penalty from removal to suspension for rehabilitated worker . . .* **4**

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The most economical way a federal agency can subscribe to the *Federal Labor-Management and Employee Relations Consultant* for FY 87 is to "ride" OPM's printing requisition to the Government Printing Office. This will save over half of the regular $28 subscription price.

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To subscribe for the coming fiscal year, agency printing officers *must send rider requisitions to the Government Printing Office, Washington, D.C. 20402 before June 20, 1986.* ■

Supreme Court Declines to Hear Two Appeals on Employee Terminations

The U.S. Supreme Court has refused to hear lower court decisions concerning agencies' authority to take personnel actions based on poor performance. The high court's refusal left intact the lower courts' determinations that the Navy and the Federal Home Loan Bank Board terminated the workers by correct legal procedures.

In *Lovshin v. Navy*, the case hinged on a lower court ruling that agencies have the discretion to use either 5 USC Chapter 43 or Chapter 75 of the Civil Service Reform Act as grounds for taking performance-based actions. (See *Consultant*, July 19, 1985, p. 1)

(continued on page 4)

Pm 1.13:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

The Wearing of the Green

Casefacts: The grievant, an employee of the Social Security Administration, was a representative of Local 3231, American Federation of Government Employees. He had just driven from his own work site to an agency office in a nearby city for an appointment with the district manager and another employee who had filed a grievance.

The union representative was dressed for the occasion. He wore a shirt, tie, sport jacket, dress slacks, and dress shoes. Under his jacket but over the shirt and tie he wore a bright green shirt emblazoned with white letters saying "I'm Proud to Be Union."

The district manager refused to meet with the representative unless he removed the green shirt. He rejected the AFGE official's suggestion that the meeting be held in the manager's semiprivate office or another room away from the view of the general public.

The union asserted that SSA violated the contract by its refusal to meet with the grievant, and should be ordered to do so. It also asked for travel expenses of 52 miles for the trip to the meeting that was never held.

Management cited an earlier 1974 contract clause whereby "Employees shall not be required to wear any particular mode of dress other than what is acceptable in the business community."

SSA argued that this requirement still existed as a past practice. The union representative's inappropriate attire justified the manager's refusal to meet.

A union witness testified that in negotiations for the current contract, the employer tried to get a dress code in the contract but later withdrew this demand. The matter was now in arbitration. AFGE argued that management had no right to control the dress of a union representative.

A letter from SSA's regional commissioner to Local 3231 said, "While this region does not have a standardized dress code, it is accepted practice that employees look presentable by adhering to the accepted mode of dress of the business community...In the future any union official who arrives at a district office for a meeting with management who is dressed inappropriately will be denied access to interviewing areas or other work areas where the public is located."

Issue: Did the employer violate the national agreement between the parties by not meeting with the grievant in his representative capacity?

Award: Arbitrator J. Scott Tharp upheld the grievance. The grievant's attire, while controversial, was appropriate for this type of meeting where the public did not participate or observe.

He found that management showed insufficient evidence of a continued past practice, adding that the commissioner's letter bolstered his opinion. A dress code, as such, did not exist for private meetings between union and employer representatives concerning grievances.

That was not to say that employees were not required to wear appropriate dress. This grievance, however, involved the very narrow issue of proper dress for a meeting between SSA and AFGE representatives. A bright green shirt with a union slogan might well not be proper attire for an employee meeting the public, but that was not the issue before him.

The meeting was between an experienced union representative and an experienced management representative. The manager was obviously not a union supporter, and the grievant was a staunch union adherent. Neither was likely to be taken advantage of by the other in a face to face confrontation.

Had it been necessary that the meeting take place in an open room where the general public was being served, the manager might have some justification for his refusal. The grievant, however, showed his willingness to meet in the manager's office or another room closed to the public.

The manager's refusal to meet in either of these locations was completely arbitrary and violated the contract. While he may have been irritated facing a shirt with a union label, he had no legal justification for refusing to meet.

His feelings toward the union would not be changed by a union shirt. On the other hand, the AFGE official's wearing of the shirt should not affect a civil discussion. While the manager's actions might be understandable, they were not justified in this instance.

Arbitrator Tharp felt that the two principals could have avoided the grievance. The grievant indicated that he wanted to union to be visible to worker at the district office.

Since he had handled 120 grievances at that office in the last three and one-half years, employees there could have had no doubt that their union was alive and well. In the arbitrator's opinion, the grievant wore the shirt for the primary purpose of irritating the district manager.

On the other hand, a veteran management representative like the district manager needed only to ignore the grievant's apparel. He would not be influenced by the shirt, and if he had simply participated in the meeting in a more private location, the issue of proper attire would not have arisen.

More vital issues, the arbitrator said, should be occupying the time of both the union and management representatives. Perhaps an earnest effort by both parties to avoid such confrontations would reap some benefits, including the saving of time and money.

The award ordered SSA to meet with union representatives in this case and others involving attire similar to the shirt in this grievance. However, because of the grievant's anxiety to provoke a confrontation which could have been avoided, the claim for travel expense was denied. (*SSA and Local 3231, AFGE*, November 11, 1985, LAIRS No. 16970) ■

Regional Structure of the Federal Labor Relations Authority

The Authority's headquarters are located at 500 C St., S.W., Washington, D.C. 20424
Commercial: (202) 382-0777 FTS: 382-0777

Region I
441 Stuart St., 9th Floor
Boston, MA 02116[1]
FTS: 223-0920
Comm: (617) 223-0920

Region II
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Region VI
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Region VII
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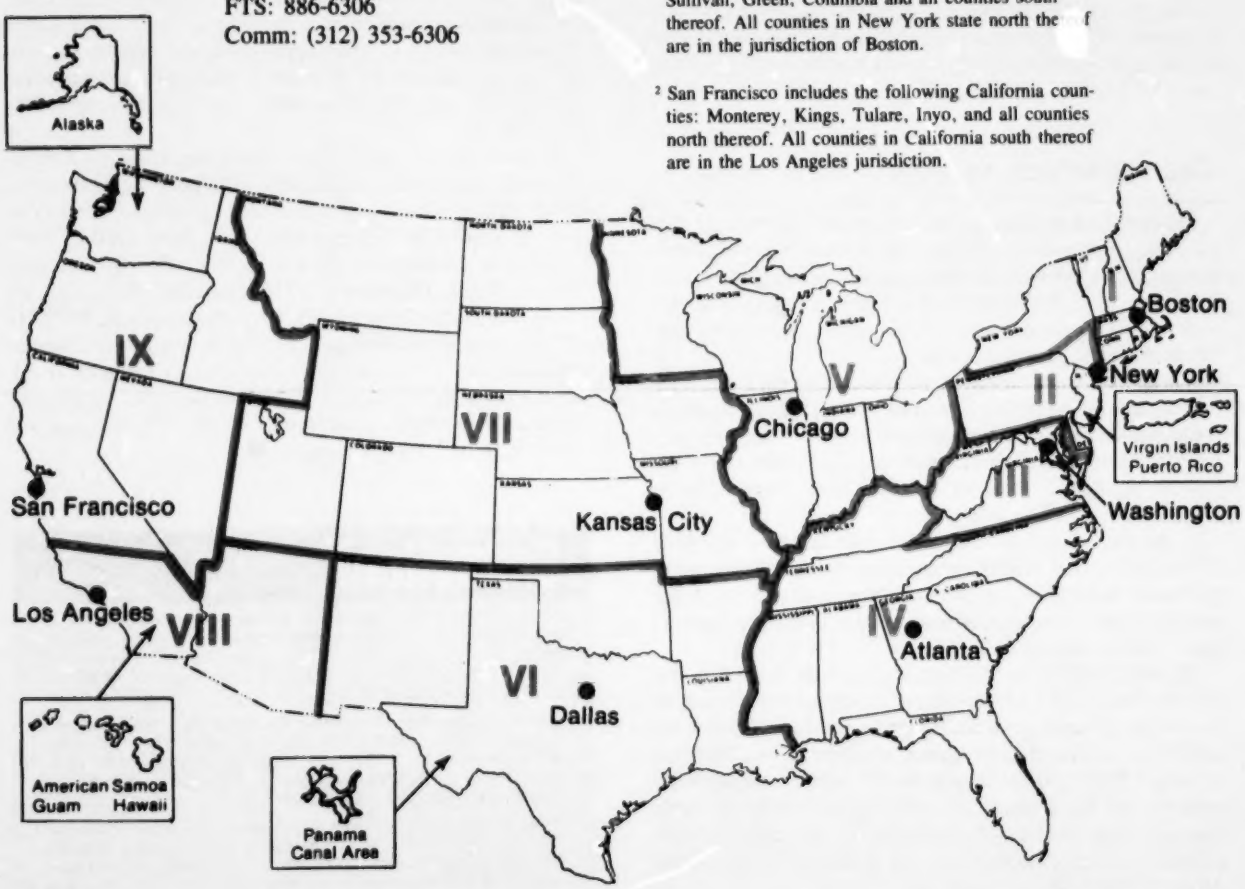
[2] San Francisco includes the following California counties: Monterey, Kings, Tulare, Inyo, and all counties north thereof. All counties in California south thereof are in the Los Angeles jurisdiction.



Authority Finds Shipyard in Violation of Arbitration Award

The Portsmouth Naval Shipyard's noncompliance with an arbitration award ordering payment of environmental differential pay (EDP) was an unfair labor practice, the Federal Labor Relations Authority holds. The Authority modified part of the ULP remedy imposed by its administrative law judge.

The Metal Trades Council had grieved unsafe working conditions for employees exposed to asbestos while doing overhaul work on submarines. The arbitrator sustained the grievance and outlined corrective measures the shipyard could take to minimize the potential for exposure.

He construed the Federal Personnel Manual as requiring management to "practically eliminate the potential for ... personal illness or injury." To the extent that the shipyard might fail to practically eliminate such potential, he ordered it to pay EDP to employees unnecessarily exposed to asbestos in the future. He also ordered the establishment of a union-management asbestos safety committee.

When the Metal Trades Council charged management with noncompliance, the ALJ told management to implement the award fully. On that part of the award covering prospective EDP, he found that but for management's failure to implement the award, workers would have received EDP for periods when asbestos conditions were substandard.

Since the record was not clear, the ALJ then required the Navy to furnish FLRA with records so that the Authority could determine the workers' eligibility for EDP. The Authority deleted this requirement, noting that such matters could be handled under the compliance process. (*21 FLRA No. 30*, March 31, 1986) ■

Court Declines to Hear (continued from page 1)

Chapter 75 authorizes personnel actions that promote the efficiency of the service. Chapter 43 permits removal, demotion or reassignment of an employee whose job performance is unacceptable. The Board had earlier held that Chapter 43, with a few exceptions, was the exclusive procedure for taking performance-based actions.

The appeals court ruling, now sustained by the high court, overturned this MSPB policy. The court said that agencies could use Chapter 75 to take adverse action for deficient performance even though this chapter lacked the substantive and procedural rights of Chapter 43. (*Lovshin v. Dept. of Navy*, No. 85-882, April 7, 1986)

In the second case the Supreme Court let stand a Federal Circuit ruling that MSPB has no authority to review or mitigate an agency's choice of a demotion or removal action taken under Chapter 43 because of unacceptable employee performance. (See *Consultant*, September 13, 1985, p. 3)

The Federal Circuit affirmed a prior MSPB finding that the intent of Chapter 43 is to simplify and expedite procedures for removing employees whose performance fell below the acceptable level within an agency's performance evaluation system. MSPB and the courts should defer to an agency's judgment of the appropriate corrective action for properly proven, unacceptable job performance, the opinion said. (*Lisiecki v. Federal Home Loan Bank Board*, No. 185-1058, April 7, 1986) ■

Board Dismisses "Blackout" Appeal as Unsubstantiated

An employee lost his claim that his resignation was involuntary due to an alcoholic blackout he suffered causing complete loss of conscious control the day he handed in his notice. The Merit Systems Protection Board concluded that the appellant's evidence was not convincing.

MSPB, noting that coercion was not alleged, ruled that the presiding official improperly relied on a test which should be applied only where agency coercion of the resignation was alleged. The appropriate test would have been the employee's *actual* condition at the time, rather than the employer's knowledge of the condition.

But regardless of which test was used, the burden of proving that the resignation was involuntary rested on the appellant, and he did not prove his case. MSPB upheld the Social Security Administration's refusal to rescind the employee's resignation and reinstate him to his former job. (*Davis v. Dept. of Health and Human Services, SSA*, MSPB Doc. No. CH07528510479, March 19, 1986) ■

New FLRA Member Nominated

The White House announced that President Reagan has nominated Jean McKee as a member of the Federal Labor Relations Authority. Upon approval by the Senate, she will fill the seat vacated by William J. McGinnis whose recess appointment expired last December. The term will expire July 1, 1989.

McKee currently serves as executive director of the Federal Mediation and Conciliation Service, a post she assumed in 1983. Prior to that she was director of government relations for the General Mills Restaurant Group from 1980 to 1983.

She was a member of the President's Advisory Commission on Public Diplomacy, 1979, and chief of staff for the New York State Assembly's minority leader in 1978. In 1976-77 she served first as deputy administrator and then as administrator of the American Revolution Bicentennial Administration in Washington, D.C. McKee was on the staff of Senator Jacob K. Javits from 1967 to 1975. She received an A.B from Vassar College. ■

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JUN – 9 1986

U. S. GOVT. PUBS.
DEPOSITORY

High Court Declines to Rule in Contracting-Out Case

In a split decision, the Supreme Court refuses to consider the negotiability of a union proposal asking the Equal Employment Opportunity Commission to comply with OMB Circular A-76 and other laws and regulations on contracting out. By its refusal, the high court let stand decisions by the Federal Labor Relations Authority and a lower court that the proposal was bargainable.

The Supreme Court noted that EEOC raised three major arguments which it did not argue before the Authority or District of Columbia Appeals Court. The Supreme Court's normal practice—from which it saw no reason to depart—is to refrain from addressing issues not raised in an appeals court. In this case, several questions upon which resolution of the case might turn could not be reached or resolved.

The case began in late 1979 when the American Federation of Government Employees presented its proposal. Both the Authority and the D.C. Circuit rejected EEOC contentions that the bid conflicted with management's right to contract out under the Civil Service Reform Act (CSRA). They also rejected EEOC arguments that the circular itself prohibited bargaining on the proposal. EEOC then asked the Supreme Court for review and submitted three new arguments.

The employer first asserted that the circular was not applicable law within CSRA's meaning of management rights. The proposal, by requiring compliance with the circular, would clash with these rights.

Second, an alleged violation of A-76 was not grievable. The circular was not a law or regulation, and it did not fall within CSRA's authorization of grievances over a violation of a law or regulation. By mandating compliance with A-76, the proposal intruded on management rights.

Third, A-76 was a government-wide regulation. As such, it was legally excluded from management's duty to bargain.

The court held that the new arguments were not properly before it. CSRA prohibited the courts from considering arguments not put before the Authority. This prohibition was not waived simply because FLRA failed to object to the introduction of the new arguments. Further, EEOC did not explain why it omitted raising these contentions before the Authority and the lower court.

Justices White and Stevens dissented, urging their brethren to overturn the D.C. Circuit decision. In their opinion, A-76 was not an "applicable" law, and requiring compliance with the circular intruded on management rights. They found that FLRA's failure to object to the introduction of additional arguments allowed the court to rule on the issues. (*EEOC v. FLRA*, Sup. Crt., No. 84-1728, April 29, 1986) ■

NEW Developments...

page

Supreme Court refuses to rule on negotiability of contracting-out proposal... 1

Board issues trilogy opinions on how it will review arbitration awards... 1

Arbitration Roundtable
Union grieves broad questions on self-development asked at promotion interview... 2

Labor-Management FORUM
Authority rules on union bids concerning liability for damage to federal property... 3

Disrespectful behavior is cause for removal... 3

President nominates chairman for MSPB... 4

Navy erred by firing worker who was successfully rehabilitated... 4

Board Sets Ground Rules for Review of Arbitration Awards

In three lead decisions the Merit Systems Protection Board establishes its policy for review of arbitration awards arising from "mixed" cases. Although most reviews of exceptions to arbitration awards are handled by the Federal Labor Relations Authority, MSPB can review mixed cases.

Mixed cases involve actions for which there are MSPB appeals procedures and in which employees also claim there was unlawful discrimination. For example, a removal for poor performance which the employee alleges was the result of racial discrimination. Employees who grieve a mixed case may later contest an arbitration award by asking for Board review.

Last year the Board asked interested parties to respond to issues concerning MSPB review of mixed case arbitration awards. On April 8, the Board addressed these questions in *Robinson v. Dept. of Health and Human Services*, MSPB Doc. No. HQ71218410007; *Denson v. Veterans Administration*, MSPB Doc. No. HQ71218410020; and *Appling v. Social Security Administration*, MSPB Doc. No. HQ75218510001.

No de novo *review of award*

In *Robinson*, the Board held that it will not provide a *de novo* review of the arbitrator's award in a mixed case. To do so would undermine the advantages of arbitration as well

(*Continued on page 4*)

Pm 1.13:

ARBITRATION
roundtable
The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Self-Development for Promotion

Casefacts: Management at the Air Force Logistics Command activity was holding promotion interviews with the top candidates for a GS-12 job. Most of the supervisors' questions were technical, covering experience and job requirements, but one question concerned self-development and improvement.

Candidate A was selected, and Candidates B and C were not. According to Local 1857, American Federation of Government Employees, Candidate C had "overwhelming experience" compared to the other two.

The union charged that the non-job related questions were a unilateral change in long accepted practices. If management wanted to institute this change, it should do so through negotiations. The parties' master agreement required the employer to bargain over changes in working conditions and the impact and implementation of such changes.

AFGE cited from the Federal Personnel Manual that in promotion evaluations, agencies must consider "pertinent training, self-development, and outside activities which would increase the employee's potential for effective performance. . . . Education may be considered as an evaluation factor only to the extent it is clearly job related or clearly provides evidence of learning ability essential for bona fide trainee positions."

Candidates A, B and C, testifying for the union, and the interviewing supervisors agreed as to what questions were asked: What were the candidates doing to improve themselves on their own time, and to what professional organizations they belonged.

When successful Candidate A was asked at the arbitration hearing whether she considered the self-development question odd, she replied, "No, I've been asked that question in practically every interview I've ever had."

The union said the broad questions asked had no relationship to the positions being applied for. Instead the questions should have concerned education or self-development pertaining to the requirements of the job.

Management told Candidate C that among the reasons for her non-selection was that she had no college degree and was not working for one, and that she belonged to no professional organizations relevant to the job. Candidate B was told that the successful applicant gave more evidence of being interested in improving than had Candidate B.

The activity explained that the purpose of an interview was to determine, by asking a standard list of questions, who was the best candidate. This was difficult when, as in this case, all the candidates were hard working, capable individuals with similar background and experience.

One way of selecting was to ask about outside activities which could indicate motivation specially qualifying a person for the job. Asking an employee's plan for self-development and job-related education went beyond personnel information and achieved a more general understanding of an applicant's abilities and training. This was the idea behind the "whole person" concept.

The whole person concept, management said, was part of the evaluation process outlined in Air Force regulations since the early 1970s. The concept could not have been initiated without negotiations with the union. Consequently, the practice was not new, and the activity had no bargaining obligation.

One item on the activity's Career Board evaluation sheet related to self-development. Factors to be considered under this item were "Continuously strives for self-improvement through job-related efforts and outside activities." Thus, the Career Board, as well as the selecting supervisor, gave consideration to self-development in making its evaluation.

It was up to the selecting supervisor to sort out job-related answers elicited in response to education and self-development questions. The weight given candidates' responses varied among selecting supervisors according to the needs of a particular job and also among different local Career Boards.

Issue: Did the employer violate the agreement by asking questions concerning self-development and education in interviews for promotion?

Award: Arbitrator William Eaton denied the grievance, holding that the union, as moving party, failed to prove by a preponderance of evidence that the contract was violated.

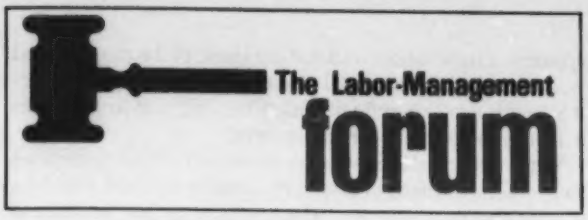
The evidence showed that the whole person program was long-standing. Management had asked questions on education and self-development as part of that program for a number of years. The arbitrator accepted management's argument that the program must have been negotiated before it could have been introduced.

The real difficulty was that the dispute did not involve separating qualified from unqualified candidates. Rather, it involved picking *the* most capable candidate from among several highly qualified applicants.

There was nothing unreasonable or novel in management's trying to select the best candidate by asking open-ended questions about self-improvement. The issue was simply whether asking the questions violated the master agreement.

Some subjective judgment enters into the selection process, and different supervisors might select different individuals from among the qualified applicants. However, Arbitrator Eaton said, there was no showing that this was an arbitrary or unreasonable practice.

And most directly to the point, this was not a newly established practice and hence not a change in conditions of employment which would violate the master agreement. (*Local 1857, American Federation of Goverment Employees and Air Force Logistics Command, McClellan Air Force Base*, May 21, 1985, LAIRS No. 16947) ■



Removal for Disrespectful Behavior

The Merit Systems Protection Board upholds the firing of of a clerk by the Department of Health and Human Services on three charges of disrespectful, disruptive and insubordinate behavior.

The HHS deciding official did not consider a lesser penalty because two earlier disciplinary actions on similar charges were unsuccessful in changing the appellant's conduct. Further, her actions in front of other workers were a serious challenge to supervisory authority.

The Board noted that in previous decisions it had found this kind of behavior unacceptable and not conducive to a stable work environment. Disrespect toward supervisors seriously undermines management's capacity to maintain employee efficiency and discipline.

An agency is entitled to have employees respect authority in the form of supervisors as well as rules and regulations, and employees are expected to deport themselves in conformance with accepted standards. Moreover, proper performance of government business requires that employees treat each other with a mimimum degree of courtesy. (*Fonville v. HHS*, MSPB Doc. No. DC07528510488, April 4, 1986) ■

SSA's Denial of Union Request for Information Wasn't Unfair Labor Practice

Because the union failed to establish the necessity for the unsanitized information it sought, the Social Security Administration did not engage in unfair labor practices by refusing to give the American Federation of Government Employees data on time and attendance records, performance appraisals, etc. So ruling, the Federal Labor Relations Authority dismissed the union's complaint.

AFGE's need for the data was not apparent from the circumstances. The union failed to answer management's request for clarification so that SSA could make an informed judgment on whether the information was necessary for bargaining purposes. (*21 FLRA No. 35*, April 14, 1986) ■

Bargaining on Liability for Damaging Government Property

Ruling on two union proposals concerning employee liability for damage to government property, the Federal Labor Relations Authority finds one negotiable and the other non-negotiable.

In the first proposal Council 214, AFGE asked the Air Force Logistics Command (AFLC) activity to stay discipline against a worker held liable for loss, damage or destruction of government property until the arbitrator issued an award. The Authority told the employer to bargain on this.

The proposal did not conflict with the Air Force Secretary's final authority to decide issues of employee liability, FLRA ruled. There was no indication that Congress intended the Secretary's authority to be exclusive. Further, the bid did not interfere with management's right to discipline. And lastly, if the parties disagreed on whether the proposal conflicted with their master contract, they could use the negotiated grievance procedure to settle the issue.

The second proposal would have allowed AFLC to hold an employee financially liable for damage to agency property only when the damage resulted from *gross* negligence. An activity regulation provided that a worker was liable if the loss resulted from *any* negligence.

The Authority said this proposal was not bargainable because it interfered with management's right to determine internal security practices. Agency policy on the amount a worker must pay was part of management's plan to minimize risks of loss or damage by making clear the consequences of employee actions. (*21 FLRA No. 34*, April 8, 1986) ■

Bargaining on Office Relocation

The Social Security Administration's decision to move its offices in two cities had more than minimal impact, the Federal Labor Relations Authority determines, and SSA's rejection of union attempts to bargain over the impact of its decision was an unfair labor practice.

If the employer's exercise of a management right changes working conditions of bargaining unit members and the impact was reasonably forseeable, the agency must bargain on the impact. Here the four and five block moves affected building structures and office space, among other things. Further, the move was permanent. (*21 FLRA No. 72*, April 30, 1986) ■

NFFE Proposal Found Negotiable

The Federal Labor Relations Authority holds negotiable a union proposal which would require that employees changing jobs retain their exceptional or highly successful performance ratings for one year, provided they had not changed career fields. The bid was made by the National Federation of Federal Employees to the U.S. Army Engineers.

Although management argued that the proposal conflicted with a regulation automatically setting an entrance rating at "fully successful," FLRA found no compelling need for the regulation. The Authority noted that the agency did not argue that the competitive area contained both unit and nonunit employees. (*21 FLRA No. 37*, April 14, 1986) ■

MSPB Chairman Nominated

The President has nominated Daniel R. Levinson as chairman of the Merit Systems Protection Board to a seven-year term expiring March 1, 1993. Upon confirmation by the Senate, he would succeed Herbert E. Ellingwood.

Levinson is general counsel for the Consumer Product Safety Commission, a position he has held since 1985. Previously he served as deputy general counsel at the Office of Personnel Management for two years. Before that he was a partner and associate at the Washington law firm of McGuiness & Williams.

He has been an adjunct lecturer at Catholic University of America and American University Law School. Levinson received an A.B. from the University of Southern California, a J.D. from Georgetown University, and an LL.M. from George Washington University. ■

Successful Rehabilitation Mitigates Discipline

The Navy's removal of the appellant, in spite of his successful participation in the agency counseling program and apparent rehabilitation, violated the intent of the program and was an abuse of managerial discretion. So finding, the Merit Systems Protection Board orders the shipyard to substitute a 15-day suspension for the removal.

While the employee was on temporary detail to another shipyard, he engaged in disorderly conduct and took two days of unauthorized absence. Upon return to his permanent assignment, he voluntarily enrolled in the counseling and treatment program for his personal problems.

His attendance record improved dramatically, and he presented no further problems. He received a satisfactory performance appraisal and a promotion. Nevertheless, his employer fired him nine months after the incidents took place.

At the initial MSPB hearing the presiding official concluded that agency regulations for the counseling program required the employer to give a problem worker a firm choice between successfully completing counseling and disciplinary action. He held that because the appellant successfully completed the program without a relapse to additional misconduct, the shipyard was barred from taking adverse action.

The full Board, however, interpreted the regulations as guidelines, not mandatory rules providing a guarantee to the appellant. But since the regulations emphasized rehabilitation, removal was too harsh a penalty in the circumstances of this case. (*Tactay v. Navy*, MSPB Doc. No. SEO7528510219, April 4, 1985) ■

Review, (*Continued from page 1*)

as delay resolution of the dispute and increase settlement costs. Moreover, appellants have a right to a new trial on discrimination claims in a district court.

Board to defer to arbitrator

Since a new hearing is not required, MSPB said it will give deference to the arbitrator's decision. It will alter an award only if the appellant shows that the arbitrator erred in interpreting civil service law, rule or regulation.

Hearing transcript not required

An appellant is not required to submit a transcript or tapes of an arbitration hearing, according to the Board's *Denson* opinion. Lack of these records is not a basis for a new hearing. The appellant must, however, make submissions to MSPB under requirements similar to those set up by the Authority.

MSPB will rule on discrimination and other appealable matters

The Board held in *Robinson* that allegations of *both* discrimination and otherwise appealable matters are properly before it and subject to review. It based this conclusion on the legislative history of the Civil Service Reform Act and court and Comptroller General decisions.

Few remands to arbitrator

On the question of what the Board should do if an arbitrator failed to address all the material issues presented, MSPB ruled in *Appling* that it will generally make the needed determination on its own rather than remanding the case to the arbitrator. Resolution of unaddressed issues at the Board level "may be preferable" to remanding the case with consequent delays and added costs.

Awards must follow MSPB precedent

In *Robinson*, the Board said it will review awards to ensure conformity with civil service law based on MSPB precedent. MSPB noted that the *Cornelius v. Nutt* Supreme Court decision requires arbitrators to apply substantive Board rules because not to do so would lead to inconsistent results and forum shopping.

Conformity with MSPB precedent, the Board concluded, would carry out Congressional intent. It would also make federal managers more confident that their actions would be reviewed similarly whether an employee appealed to MSPB or used the negotiated grievance procedure.

Grievants, not union, can seek review

The Board held in *Appling* that unions have no independent right to Board review. Only aggrieved employees can seek Board review in mixed cases. ■

Consultant

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NEW Developments...

page

FLRA claims jurisdiction over exceptions to interest arbitration awards... 1

Federal Circuit chides Board for "rigid" refusal to award attorney fees... 1

Arbitration Roundtable
Was removal too harsh a penalty for borrowing money from private vendors?... 2

Labor-Management FORUM
Authority made progress in reducing backlog, court says... 3

OPM study shows recent drop in number of arbitration awards reported... 4

Board explains when agency can take action for use of approved leave... 4

FLRA Asserts Authority to Review Interest Arbitration Awards

The Federal Labor Relations Authority rules that it has jurisdiction to review all interest arbitration awards. (An *interest* arbitration award resolves a bargaining impasse, in contrast to a *grievance* arbitration award which adjudicates an alleged contract violation.)

FLRA said that when the Federal Service Impasses Panel grants the parties' request to refer their bargaining dispute to arbitration, or when the Panel directs them to submit their dispute to mediation-arbitration, the resulting interest arbitration award is reviewable by FLRA if an exception is filed under 5 USC § 7122(a). This is so regardless of whether the arbitrator is a Panel member.

In this case, the Panel recommended to Edwards Air Force Base and Local 3854, AFGE that they submit their dispute on a union proposal to the FSIP chairman for mediation-arbitration. When mediation failed, the chairman ordered the parties to adopt a provision allowing the union representative to use the AUTOVON telephone system for contacting the local's president at another activity about contract matters affecting workers at Edwards.

The Authority said it viewed such an award as an award by an individual arbitrator rather than as a final action by the Panel. It sustained the chairman's award. (*21 FLRA No. 61*, April 24, 1986) ■

Comptroller General Rules Holiday Furloughs Illegal

The U.S. Comptroller General holds that agencies cannot furlough workers *solely* on federal holidays and deny them pay for the holidays. Unless the holiday occurs within a furlough period and employees are in nonpay status on the workday preceding or following the holiday, they must be paid. To rule otherwise would mean that agencies were free, in effect, to abolish all federal holidays.

The CG responded to a Congressional request on whether the plan of Agriculture's Food Safety and Inspection Service, (FSIS), to furlough employees on Memorial Day, July Fourth and Labor Day was legal. The decision noted that the American Federation of Government Employees was seeking a court injunction to halt the FSIS plan. Further, March 18 furlough guidance by the Office of Personnel Management advised agencies that they could legally furlough employees solely on a federal holiday.

While it was generally CG policy not to issue opinions on matters in litigation, the fact that OPM's support of the legality of holiday furloughs rested on a misapplication of prior CG decisions warranted an exception. The CG held that the decisions relied on by OPM did not endorse holiday furloughs, and the FSIS action was not a bona fide furlough. (*CG B-222836*, May 8, 1986) ■

Court Reverses MSPB on Attorney Fees

Overturning the Merit Systems Protection Board's refusal to award attorney fees to the employee who succeeded in having his removal reduced to a 30-day suspension, the U.S. Court of Appeals for the Federal Circuit remands the case to the Board.

The court ordered MSPB to decide whether to allow full fees or make some deduction for the fact that minor charges were sustained. If the Board made any deduction, the court cautioned, it should be small.

Judge Davis noted that while MSPB and the Federal Circuit sustained the three charges made by the Department of Housing and Urban Development against the appellant, the lead charge—engaging in outside employment without authorization—was based on a purely technical violation of an agency regulation. The remaining two charges were neither serious nor significant.

(continued on page 3)

PM 1.13:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Penalty for Borrowing Ten Dollars

Casefacts: An employee of the Canteen Service of the Veterans Administration was fired for allegedly accepting two $5.00 loans from a food service vendor. As stock clerk, the grievant ordered from private vendors all food and nonfood items for meals at the medical center.

He was solely responsible for selecting vendors. He and his supervisor discussed the weekly menu and decided on the type and quantity of food to be purchased. The grievant then ordered, depending upon quality and cost.

The canteen chief noticed discrepancies between the vendors' invoices sent to the financial center and the invoice sent by Canteen Services. After an investigation, one vendor made a written statement that the grievant had twice asked to borrow $5.00 from him.

The vendor lent the money, concerned that if he did not the grievant would not order from him. Other vendors and employees indicated similar conduct by the grievant on other occasions, but none gave a statement of specifics.

The agency charged the grievant with violating VA regulations. These rules prohibit employees from borrowing or lending money and soliciting or accepting gratuities from government contractors, and from favoritism in awarding contracts.

At the arbitration hearing, the National Federation of Federal Employees pointed to the grievant's eight-year unblemished record, with the exception of one AWOL. He had worked his way up from the dishroom to the stock clerk position.

The grievant denied requesting money from the vendor who had reported it or from anyone else. He said the vendor was upset because the grievant cut back on purchasing from his company because of its higher prices.

At the hearing the vendor testified that he loaned the money as an act of friendship. He admitted that he did not think he had to do this to keep his business with VA.

A second vendor testified that the grievant tried to borrow $50.00 from him, but the vendor refused. He added that the grievant made similar requests several times, but could not be specific on the dates, times or amounts.

The union contended that the second vendor's testimony was inadmissable since management gave no notice of his appearance. Neither the removal notices nor the appeal file gave any indication that the employer relied on anything other than the first vendor's statement. Both the contract and agency rules required VA to provide a grievant, before the arbitration hearing, with notice of all evidence it would be presenting to support its charges.

The VA argued that the second vendor's testimony must be permitted. The proposed removal letter indicated that the grievant was found soliciting on "several occasions," thus notifying the union that vendors would be asked to testify about these occasions. A proposed removal letter did not have to specify names and dates as a prerequisite to presenting evidence at an arbitration hearing.

Management maintained that the relationship between the stock clerk's duties and his offenses warranted removal. Moreover, VA's table of penalties and offenses permitted removal on a first offense of solicitation of gratuities and borrowing money.

NFFE contended that the employer failed to prove its case. Only the first vendor provided direct evidence, and this should carry no weight because it was based on the grievant's reduced purchases from the vendor. Further, the vendor's testimony contradicted his written statement. The second vendor's testimony was mostly hearsay.

The union said that removal was excessive because management failed to consider mitigating factors like the grievant's good work record. The table of penalties provided for reprimand as the penalty for a first offense of this kind. Removal for a first offense conflicted with the contract's requirement of progressive discipline, implying an effort to correct and improve behavior.

Issue: Was the grievant's removal for just cause?

Award: Arbitrator Joseph A. Raffaele mitigated the removal penalty to three months' suspension. He ordered the grievant's reinstatement with back pay starting three months from the date of his discharge, less any earnings during the time he was fired.

Based on his reading of the contract and regulations, the arbitrator held that VA failed to give the grievant a chance to review all material to be used against him prior to its introduction at the hearing. This put NFFE in the unfair position of having to address the second vendor's charges for the first time in arbitration. The arbitrator excluded the second vendor's testimony from his consideration.

There was no doubt that the grievant requested $5.00 from the first vendor. While the arbitrator did not agree that the vendor fabricated the charges, there was no showing that the grievant was trying to use his position to extract favors from the vendor. Nevertheless, the grievant used poor judgment in requesting such favors, and he violated regulations.

To determine whether removal was appropriate, Arbitrator Raffaele relied on standards listed in the Merit Systems Protection Board's *Douglas* decision. He found the grievant's offense to be serious but apparently not repeated. The clerk had a position of trust. Except for a reprimand, his disciplinary and work histories were good, and he seemed to have potential for rehabilitation.

The arbitrator ruled that a lesser penalty of supension would deter the grievant from future misconduct and provide an example to others. He warned the employee that any more misconduct like this could mean discharge. (*VA and Local 1453, NFFE,* May 1, 1985, LAIRS No. 16915) ■

The Labor-Management **forum**

DC Circuit Lauds Authority's Timelier Handling of Cases

The Federal Labor Relations Authority is making notable progress in reducing its backlog of cases, the U.S. Court of Appeals for the District of Columbia Circuit finds. The court accordingly dismissed the American Federation of Government Employees's petition that FLRA be made to speed up its decision-making.

The union had charged the Authority with unreasonable delay in processing negotiability and unfair labor practice appeals. AFGE cited 17 such cases, some of them four years old.

The court commented that while FLRA's past record of delay was "intolerable," the agency was now remedying the situation. Judge Ginsburg warned, however, that if the Authority lagged in trying to improve processing, the union could return to court for relief. (*AFGE*, USCA DC, No. 85-1363, May 6, 1986) ■

Appellant's Late Receipt of Proposed Removal Not Harmful Error, Court Holds

In a split decision, the Federal Circuit Appeals Court says the appellant's allegedly late receipt of the Postal Service proposal to remove him was not a harmful error. Although the law requires 30 days' notice, agencies should not be punished for nonprejudicial errors they committed while trying to carry out the Congressional mandate of an efficient government.

The Federal Circuit also rejected the appellant's claim that he was denied constitutional due process. He argued that because he was not notified in time, he had no chance to defend himself at the step one meeting of the grievance procedure. Instead, a union shop steward represented him. The court held that since the steward made an oral reply on his behalf, the appellant was not denied the necessary minimum due process.

The employer fired the appellant for assaulting a postal police officer, disorderly conduct and resisting arrest. The employee was already on a "last chance" basis for fighting with another worker. The agency had proposed his removal, but the same shop steward persuaded management to give the appellant one more chance.

More than 30 days before the action, the agency mailed one copy of the proposed removal to the steward and four copies to the appellant at two addresses. The steward's notice arrived on time, and he scheduled a step one meeting. The employee's notices— apparently delayed in the mail—arrived 12 days short of the period prescribed by law and two days after the grievance meeting.

The court noted that the appellant made no effort to notify management or the union of the late receipt so he could obtain another step one meeting at which he could be present. It was not until the initial Merit Systems Protection Board hearing that he alleged procedural error.

The late receipt was not caused by design or negligence by the employer. Because of the employee's silence, the Postal Service had no way of knowing of the late receipt or why he did not show up at the meeting.

The appellant failed to prove denial of due process or harmful error, the Federal Circuit concluded. Consequently, the Board's decision to sustain his removal was not arbitrary, capricious or contrary to law.

In sharp disagreement, the dissenting opinion held that the appellant was denied due process and that the procedures used by the employer to effect the removal constituted harmful procedural error. (*Smith v. U.S. Postal Service*, USCA Fed. Cir., App. No. 85-2168, April 24, 1986) ■

Attorney Fees (continued from page 1)

The appellant inadvertently received his authorizing memorandum from the wrong person (the area manager) in the HUD hierarchy. The appellant, his coworkers and the area manager himself believed that he had the authority to grant approval.

When the employee sought reinstatement, the Board upheld HUD. The court vacated MSPB's decision and directed it to consider mitigating factors in determing an appropriate penalty.

The Board then reduced the removal to a suspension. It rejected the appellant's claim for attorney fees, ruling that an award was "not merited in the interest of justice" since the petitioner committed some misconduct.

The court rejected the Board's "rigid and simplistic argument" that because the charges were sustained the employee could not be considered substantially innocent. "That mechanical position disregards the nature and weight of the particular offenses, and treats fleas as always the equivalent of elephants," Judge Davis wrote.

The sustained charges were technical and minor. Further, the drastic removal penalty was significantly mitigated to a lesser penalty of suspension. In the Federal Circuit's opinion, not only did the appellant prevail, he also showed himself substantially innocent and thus entitled to attorney fees.

Judge Bissell's concurring opinion said that without the prospect of an attorney fee award, if the underlying basis of the charges is found to be correct, "many employees would be forced to accept an...unreasonably harsh penalty without dispute since even a successful challenge would leave them severely in debt and possibly worse off than if they had not challenged the penalty." (*Van Fossen v. MSPB*, USCA Fed. Cir., App. No. 86-536, April 10, 1986) ■

Correction

The Federal Labor Relations Authority map in the May 9 *Consultant* incorrectly showed Kansas City as Region VI headquarters. The correct city is Denver.

When Management May Discipline for Use of Approved Leave

After repeating its earlier holdings that an agency cannot take action against an employee on the basis of using approved leave, *per se*, the Merit Systems Protection Board set forth the basis on which an agency may impose discipline in other related situations: failure to follow leave-request procedures *if* the worker was on notice of the procedures and the likelihood of discipline for continued failure to comply with the procedures.

The Board also noted that an agency may rely on approved leave as the basis for *nondisciplinary* removal actions in situations stemming from an employee's obvious physical or mental disability, where relying on the approved leave would show the employee's unavailability.

The U.S. Postal Service had fired the appellant on charges of AWOLs and continued failure to be regular in attendance. The employe had a 10-year record of 35 instances of irregular attendance and AWOL for which he had been counseled and disciplined.

The incidents precipitating his removal were several late arrivals caused by his car or taxi problems. Although the agency initially excused these latenesses, the leave control supervisor found his explanations inadequate and charged him with AWOL.

MSPB ruled that management properly removed the appellant. His many unscheduled absences, their harmful effect on the employer, and the agency's repeated counseling on the consequences of continued offenses justified his firing.

Further, management properly charged him with AWOL for his recurring personal transportation problems since it had warned him that absences for these reasons were subject to discipline. (*Fleming v. U.S. Postal Service*, MSPB Doc. No. ATO7528510197, February 28, 1986) ■

Authority Rules Negotiable Union's RIF Proposals

The Department of Housing and Urban Development must bargain on two union proposals requiring it to conduct a cost-benefit study before conducting a reduction-in-force, the Federal Labor Relations Authority holds. The proposal requires HUD to consider certain alternative actions without obliging it to adopt any of them in lieu of a RIF, the Authority noted.

The study would determine whether furloughs or employee retraining would be more cost-effective than layoffs. The American Federation of Government Employees proposal contains a formula for determining the cost of a furlough based on a specified number of days employees at various grades would be furloughed.

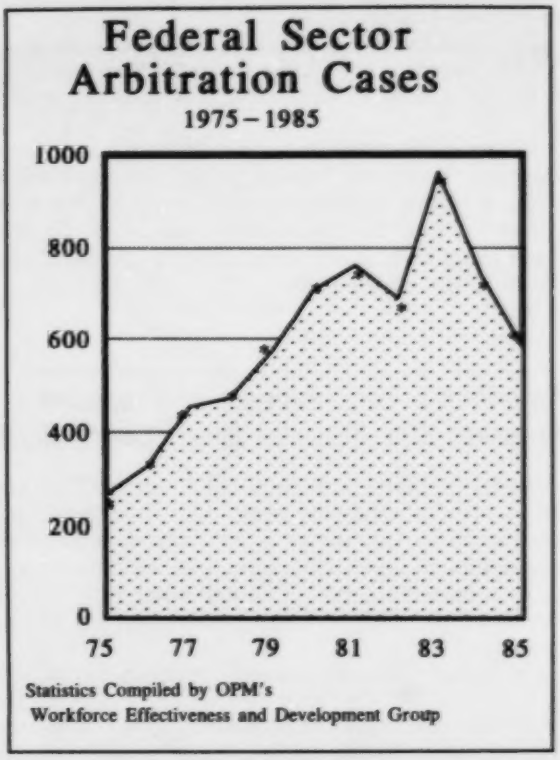
When calculating the cost savings of furloughs, the employer must consider all wage grade employees as general schedule employees at GS-5 or below. Printing employees must be considered at GS-10 or below. The Authority held that, contrary to management arguments, this did not deal with the nonnegotiable area of position classification. (*21 FLRA No. 46*, April 21, 1986) ■

Annual Record of Federal Sector Arbitration Cases

Although the number of federal arbitration cases has increased over the past decade, data compiled by the Office of Personnel Management show an up and down pattern. The low was 272 cases in 1975, and the high was 963 in 1983.

The first four years on the graph below, 1975-1978, cover the federal labor-management program when it was governed by an executive order. The Civil Service Reform Act, effective January 11, 1979, broadened the scope of grievable issues, thus causing a large jump in the number of arbitration cases reported in 1979 and 1980. In 1981 the total rose to 762.

The number dropped to 689 cases in 1982, and then shot up to 963 in 1983. The next two years figures declined, from 739 cases in 1984 to 582 in 1985. ■



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Court Supports Firing for False Back Pay Claim

The U.S. Court of Appeals for the Federal Circuit ruled that the Merit Systems Protection Board acted properly when it upheld the removal of an employee who filed a false back pay claim.

The employee had been fired and ordered reinstated with back pay in an earlier case. Under the law, an agency must reduce any back pay award by the amount the employee earned through any other employment during the period for which he is awarded back pay.

When the Army queried him on outside income, the employee said he had not earned any wages during the period for which he was awarded back pay, and submitted a notarized statement to this effect. Based on his statement, the agency gave him a check for over $78,000.

After giving him the check, the Army learned that he had earned $28,774 through other employment which he should have reported. It charged him with misconduct and removed him from his job. When he appealed to the MSPB, the Board affirmed his removal.

The employee appealed to the Federal Circuit. The court rejected his claim that he did not understand the regulations requiring him to report his earnings. Agreeing with the official who presided over the MSPB hearing, the court found the employee's obligation to report his earnings was clearly stated.

The Federal Circuit also said that the appellant's claim that he was confused provided no basis for overturning the presiding official's finding that he was properly removed. The court found no reason to reverse the MSPB decision that the removal was proper. (*Harp v. Dept. of Army*, USCA Fed. Cir., App. No. 85-2791, May 20, 1986) ■

Appellate Courts Reverse Two FLRA Rulings

The U.S. Court of Appeals for the Fourth Circuit holds that the Federal Labor Relations Authority erred in finding negotiable a union proposal which would have established a moratorium on performance apraisals while employees became familiar with new guidance governing their work.

The court concluded that the National Federation of Federal Employees bid violated management's right to direct and assign work. Accordingly, the Social Security Administration had no obligation to bargain on the NFFE proposal. (*SSA v. FLRA and NFFE, Intervenor*, USCA 4th Cir., No. 85-1601, May 22, 1986)

NEW Developments

JUL 7 1986
PUBS. DEPOSITORY 376

Federal Circuit finds no error in removal of employee with false claim... 1

Contrary to FLRA ruling, court says proposal violated management rights... 1

Arbitration Roundtable
Did employer's request for Social Security number violate worker's privacy?... 2

Labor-Management FORUM
MSPB reports reduced backlog in FY 85... 3

Executive Order bars intelligence agents, U.S. Marshals from bargaining... 3

FLRA outlines elements arbitrators must consider in determining reasonable attorney fee awards... 4

Bookshelf 4

In the second case, the District of Columbia Circuit reversed an FLRA ruling that the Internal Revenue Service did not engage in an unfair labor practice when it reprimanded two workers for disclosing confidential taxpayer information. IRS had charged the two, who were preparing for a grievance, with allowing their union attorneys to see restricted data on daily workloads.

The court noted that while IRS law and rules generally ban disclosure of this information, one exception is the maintenance of stable labor relations. To fulfill its duty to represent federal employees, a union must have access to agency records for bargaining and grievance purposes. The IRS Code provides for authorized access for use in personnel or claimant representative matters.

Here a supervisor's uncertainty about disclosing the information confused and misled the grievants. As a result, the employees lacked fair notice that their action was prohibited. The court held that in this unique situation it was an unfair labor practice to discipline them. The Authority should not have dismissed the National Treasury Employees Union's ULP complaint.

The Federal Circuit added that this "misadventure" placed IRS officials and workers and union representatives on notice that unauthorized disclosure of taxpayer information for personnel purposes, whether to employees or outsiders, was prohibited. (*NTEU v. FLRA*, USCA D.C. Circuit, No. 85-1351, May 23, 1986) ■

PM 4/3:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

A Matter of Privacy?

Casefacts: Management at the Air Logistics Center refused to check out a tool to an employee because he refused to give his Social Security number.

The temporary loan card employees were required to complete when checking out tools contains a place for their Social Security numbers and a Privacy Act statement that disclosure of the Social Security number is voluntary. It also states that failure to supply the number could result in the tool's not being issued.

When the employee refused to give his Social Security number, management would not issue him the tool he needed. Later that day it sent him home.

Local 916 of the American Federation of Government Employees contended that the maintenance operating instructions and the appropriate agency regulation issued by the Air Force Logistics Command do not refer to Social Security numbers. Also, the agency deprived the employee of his privacy by telling him he had to use his Social Security number on the temporary loan card.

Management responded that the regulations do not prohibit the use of Social Security numbers and that the temporary loan card is a pre-printed form issued by the Air Force Logistics Command. Management also pointed out that the Privacy Act statement on the card clearly states that failure to supply the Social Security number could result in tools not being issued.

If the employee disagreed with the requirement, he should have provided the number and then filed a grievance questioning the requirement. Instead, he resorted to self help by refusing to provide the number.

The union agreed that the agency had the authority to order the employee to provide his Social Security number but argued that it had not done so. If the employer had ordered the grievant to provide his Social Security number and he had then refused, he would have been resorting to self help as claimed by the agency.

Issue: Did management at the Air Logistics Center violate any law or rule by requiring the employee to use his Social Security number on the temporary loan card?

Award: Arbitrator Wallace B. Nelson denied the grievance. AFGE did not show that the employer violated any law or rule when it asked the grievant to write his Social Security number on the temporary loan card.

Before considering the issue, the arbitrator commented that there seemed to be some inconsistency between the issue the parties asked him to decide and the union's admission that management had the right to require the employee to give his Social Security number.

He also noted that the grievance he was deciding concerned only the issue of whether management violated law or rule when it required the employee to give his Social Security number. AFGE had filed separate grievances over management's refusal to issue the tools and its decision to send the grievant home.

Arbitrator Nelson agreed with the agency that the regulations do not prohibit the use of Social Security numbers by not requiring their use. He then considered whether the agency violated the Privacy Act.

The Privacy Act was passed in 1974 because of concerns which included the growing use of Social Security numbers for purposes other than Social Security recordkeeping. Federal, state, and local governments had started using Social Security numbers for their record systems. This practice, combined with the growing use of computers, created the fear that the privacy of individuals would be invaded.

The law clearly prohibits any federal agency from denying any individual any right, benefit or privilege provided by law because of the individual's refusal to disclose his Social Security number. However, the act also contains certain exceptions to this rule, and other exceptions were added by later laws.

According to the arbitrator, two exceptions in the act applied to this case. One stated that the prohibition on requiring disclosure does not apply to "the disclosure of a Social Security number to any federal, state or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual."

He found that Executive Order 9397, issued in 1943, was a regulation and that it authorized the use of the Social Security number as an identifier. The Department of Defense had been phasing-in a program of using the Social Security number since 1967. Therefore, a regulation existed before 1975 which concerned the use of Social Security numbers as identifiers.

The second exemption to the restriction authorizes disclosure for a "routine use" which is defined as a use that is compatible with the purpose for which the record was collected. The arbitrator found that the use of a Social Security number to identify employees who check out tools is a routine use.

Finally, the arbitrator observed that the Social Security number itself discloses no information about the individual although it is a powerful and effective means by which personal information can be ordered and exchanged. (*Air Force Logistics Center, Tinker Air Force Base and American Federation of Government Employees Local 916,* April 14, 1986, LAIRS No. 17299) ■

The Labor-Management **forum**

Board Reports on FY 85 Decisions

A recent study by the Merit Systems Personnel Board shows that its regional offices decided 6,523 appeals by employees challenging management actions in Fiscal Year 1985. Fifty percent (3,283) of these were adverse actions cases. (See chart below.) The other half covered such categories as reductions-in-force, disability retirement, denials of within-grade pay raises, etc.

Regional offices dismissed 57 percent of the total 6,523 cases they decided in FY 85. Reasons for dismissal were lack of MSPB jurisdiction, late filing, applicant's withdrawal, or because the parties settled the matter.

Of the 2,787 cases decided on their merits, the regional offices reversed or mitigated the employer's action in 676 cases (24 %) and upheld the agency in 2,111 cases (76 %). MSPB cautioned that there are no statistical standards on what should be the "right" percentages of decisions affirming or modifying agency actions.

Employees, employers and the Office of Personnel Management presented 2,174 regular petitions to the full Board for review of initial decisions. The Board dismissed all but 498 (23 %). Of the 498 decided on their merits, MSPB reversed, mitigated, remanded and vacated 287 of the initial decisions, and affirmed 211.

The report called FY 85 the beginning of "normalization" for processing cases. Beset for several years with staff and budget limitations, as well as over 11,000 appeals stemming from the 1981 Air Traffic Controllers' strike, MSPB said it has now significantly reduced its backlog. (*Study of MSPB Appeals Decisions for FY 1985)* ■

Executive Order Bars Bargaining for Some Justice Department Employees

Exercising his authority under the Civil Service Reform Act, President Reagan has issued Executive Order 12559 exempting several Justice Department agencies from the labor relations program for reasons of national security. The order was effective May 20.

Excluded from bargaining are the Office of Enforcement and the Office of Intelligence, including domestic field offices and intelligence units, of the Drug Enforcement Administration. Also exempt are the Office of Special Operations, Threat Analysis Group, Enforcement Operations Division, Witness Security Division and Court Security Division in the Office of the Director and the Enforcement Division in the U.S. Marshals Service. ■

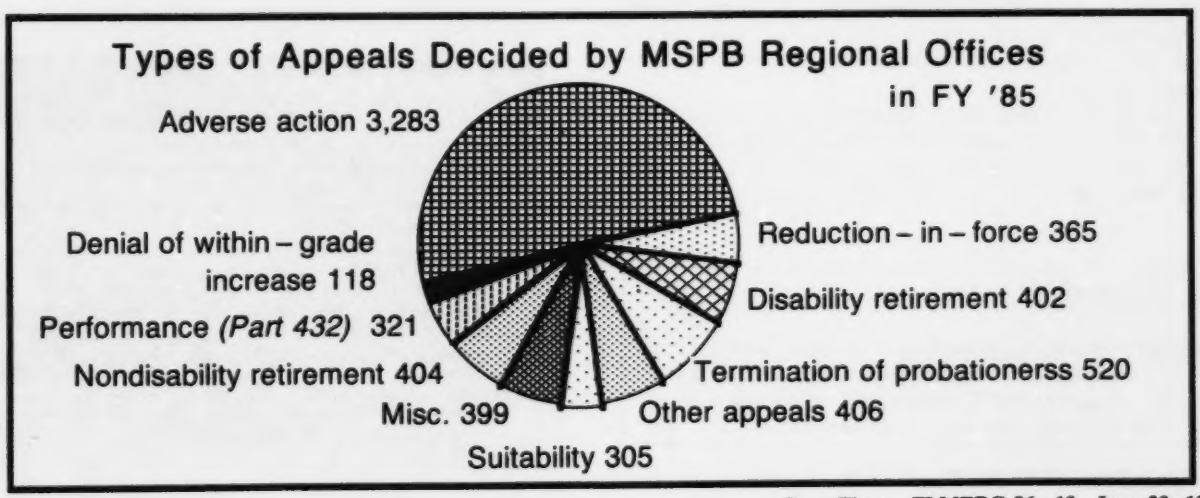
FLRA Rules on Arbitration Awards

The Federal Labor Relations Authority alters an award where the arbitrator wrongly substituted his judgment for that of Social Security Administration management on the appropriateness of performance standards. The arbitrator found that the grievant's performance rating should have been at least fully satisfactory.

The production standards were inconsistent with the labor agreement, he said, and but for the erroneous contract application the grievant would have been promoted. He awarded the employee a retroactive promotion. FLRA, however, ordered SSA to reevaluate the grievant and take appropriate action regarding the promotion. (*21 FLRA No. 86,* May 9, 1986)

In a second case the Authority set aside an award finding that the Overseas Federation of Teachers violated the contract by seeking redress for a grievance outside the negotiated procedure. (See the *Consultant,* Arbitration Roundtable, April 25, 1986)

The union had written to the President and several members of Congress on the grievance and urged unit employees to do the same. The arbitrator held that the union must exhaust the negotiated grievance procedure before using other forums. No, the Authority said, federal workers have a right to petition Congress. (*21 FLRA No. 94,* May 12, 1986) ■


Types of Appeals Decided by MSPB Regional Offices in FY '85
Adverse action 3,283
Reduction – in – force 365
Disability retirement 402
Termination of probationerss 520
Other appeals 406
Suitability 305
Misc. 399
Nondisability retirement 404
Performance (Part 432) 321
Denial of within – grade increase 118

Computing Fee Awards to Union Attorneys

In three arbitration awards involving payments of attorney fees to union staff attorneys, the Federal Labor Relations Authority modifies two and sustains the third. Exceptions to the first two awards were filed by agencies, and the third exception by the National Treasury Employees Union.

In the first case, the arbitrator ordered the Department of Health and Human Services to pay the union staff attorney $1,887 for handling the grievance, computing his time at a market value of $85 an hour. The Authority modified this award.

The ruling was based on the fact that the attorney was a union employee, requiring that different standards enunciated by the Merit Systems Protection Board be applied. In *Wells v. Schweiker*, MSPB found that the law "did not intend to provide a union with a windfall profit for the performance of services which it was created to provide and by their dues its members support."

FLRA said that in computing actual costs, three elements must be considered: The compensation paid the attorney for time expended; out of pocket expenses for the case; and overhead costs. If there is no evidence that an allowance of 100 percent of the attorney's compensation for overhead is substantially excessive or insufficient, an overhead allowance may normally be included as an element of actual costs.

Consequently, FLRA held, reasonable fees for union attorneys could be awarded only on a cost-plus basis, despite the union claim of higher fees because the money was earmarked for its separate legal services program. FLRA changed the fee award so that payment was estimated on a cost-plus basis rather than the market rate. (*21 FLRA No. 106*, May 22, 1986)

The second case also concerned an award of union staff attorney fees based on the market rate, here to be paid by the Internal Revenue Service. The Authority, again citing the three elements to be considered, modified the amount from a market rate to a cost-plus basis. (*21 FLRA No. 107*, May 22, 1986)

In the third case the arbitrator found that an attorney fee award at the prevailing market rate to salaried union counsel would not be "reasonable," and thus at odds with the purposes of the Back Pay and Civil Service Reform Acts. Further, it would conflict with several MSPB rulings. In his judgment, the union's creation of a special litigation fund into which attorney fees were paid did not overcome those considerations.

The arbitrator accordingly limited the award to the actual cost of the attorney's salary plus an overhead cost allowance. The Authority upheld this award. (*21 FLRA No. 109*, May 22, 1986) ■

Correction

In the article "Negotiability of Awards" in the April 11 *Consultant*, the last paragraph incorrectly stated that the additional AFGE proposals were not negotiable. The Authority had ruled them negotiable.

bookshelf

The third edition of *A Guide to Merit Systems Protection Board Law & Practice, 1979-1986*, is now available. In addition to updating MSPB and court caselaw through early 1986, Author Peter B. Broida has added a new chapter on workers' compensation and expanded the chapter on prohibited personnel practices. The 1,000-page book also contains procedural guidance and forms.

The cost is $65 per copy and $5 handling charges. Order from Dewey Publications, Inc., Suite 1102, 1717 K St. N.W., Washington, D.C. 20006, telephone 202/659-2537.

Also available from Dewey Publications is a six-hour audio cassette presentation entitled *Federal Sector Arbitration: The Course*. Four prominent arbitrators offer neutral guidance on presentation of arbitration cases. Accompanying materials cover research, discovery and appeals, forms, etc. *The Course* is priced at $85, plus $5 handling.

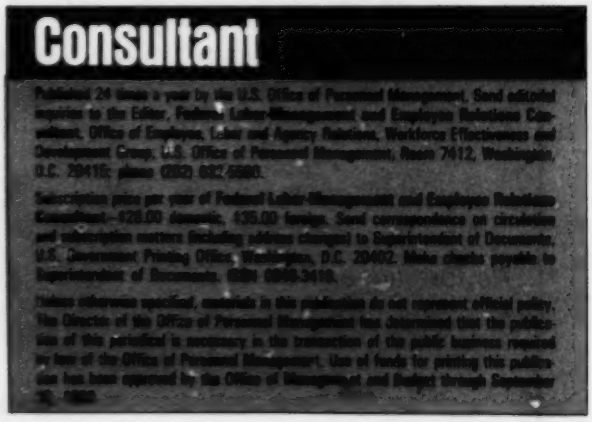
The Office of Personnel Management has published *A Survey of Productivity Provisions*. The study reports that 160 of 2,283 federal agreements include an article on productivity.

Key elements of the articles include: conservation of energy, improvement in work, reduction of absences, employee suggestions, incentive awards, measuring productivity, and carpools. Other areas cover union participation in productivity and the establishment of productivity committees and quality circles.

The 16-page study may be ordered from the National Technical Information Service, Department of Commerce, Springfield, VA 22161, telephone 703/487-4650, Order No. PB86-169430, $9.95 for a paper copy and $5.95 for microfiche. ■

New Titles for Presiding Officials

The Merit Systems Protection Board has changed the titles of its regional attorney-examiners from "Presiding Official" to "Administrative Judge." A MSPB regional director is now "Regional Director/Chief Administrative Judge." The Board says the new titles more accurately reflect the nature and functions of the positions. ■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New FSLRB Member Appointed

Jerry L. Calhoun, Federal Labor Relations Authority Chairman, announced the appointment of Marcia L. Greenbaum as a member of the Foreign Service Labor Relations Board. Her term will expire February 22, 1989.

Since 1968 Greenbaum has been a labor arbitrator, mediator and factfinder for numerous public employers and unions. As FSLRB member, she will be involved in the administration of the conduct of elections and the resolution of labor-management disputes of foreign service personnel.

The recipient of several awards in the labor-management relations field, she has written extensively on the subject. She is a graduate of the New York State School of Industrial and Labor Relations, Cornell University, with graduate work in arbitration, labor law and collective bargaining. ■

Second Circuit Declines to Review Arbitration Award

An arbitration award does not qualify for judicial review, the Second Circuit Court of Appeals says, *unless* the award involves an unfair labor practice which is part of the underlying controversy subject to arbitration. The ULP route cannot be used if it is some "after the fact outgrowth" of noncompliance with the award.

So ruling, the court dismissed the petition by the Bureau of Prisons for review of a Federal Labor Relations Authority decision upholding the award. It rejected the Bureau's contention that indirect judicial review could be achieved by management's refusal to comply with the FLRA order.

The case arose from a dispute over whether the lunch periods of physician assistants at a federal prison were "duty free" and thus properly unpaid. The arbitrator found that the assistants were entitled to 15 minutes overtime pay and that straight shifts should be resumed.

The Bureau of Prisons filed exceptions to the award with FLRA, arguing that the arbitrator's interpretation of the contract was contrary to the parties' intent and to federal pay laws. The Authority, however, upheld the award and directed the Bureau to comply.

The court said the Civil Service Reform Act sharply limits judicial review of FLRA orders on exceptions to arbitration awards. Congress meant to foreclose direct and indirect judicial review of such orders even when a ULP claim was later added.

The act likens FLRA's review to that of a court reviewing a private sector arbitral award. The Second Circuit noted that a policy favoring quick resolution is strong in both public and private sector labor relations. Indirect review would cause excessive delay and more expense. (*Justice v. FLRA*, USCA 2nd Cir., Doc. Nos. 85-4167, 85-4179, May 30, 1986) ■

NEW Developments...

No judicial review of arbitration award unless ULP is part of initial dispute... 1

Court upholds Board's application of "good cause" standard in ALJ case...

Arbitration Roundtable
Arbitrator must decide whether agency tried to bypass union president... 2

Labor-Management FORUM
FLRA to consider Privacy Act application in disclosure of home addresses to unions... 3

Criteria to determine if picketing was legal...

In case of first impression, MSPB sustains agency's removal of SES appointee... 4

Employer's unilateral change in travel expense standards results in *status quo ante* remedy...

Court Okays Discipline of Administrative Law Judge

A decision by the U.S. Court of Appeals for the Federal Circuit confirms the Merit Systems Protection Board finding that the 60-day suspension of an administrative law judge (ALJ) was justified.

The Civil Service Reform Act says that agencies can take action against an ALJ only for good cause as determined by the Board after a hearing. This is the first time the court has looked at the "good cause" standard as applied by MSPB in a disciplinary proceeding against an ALJ.

The Department of Health and Human Services proposed to remove the appellant for low output and disruptive and insubordinate conduct. It charged that contrary to office procedures, the ALJ insisted that all mail for his cases be given to him before it was logged in at a central location. He also refused to use standardized worksheets to monitor the progress of his cases.

The Board found that the appellant did not have fair notice of the separate charge of insubordination. In addition, it deter-

(*Continued on page 4*)

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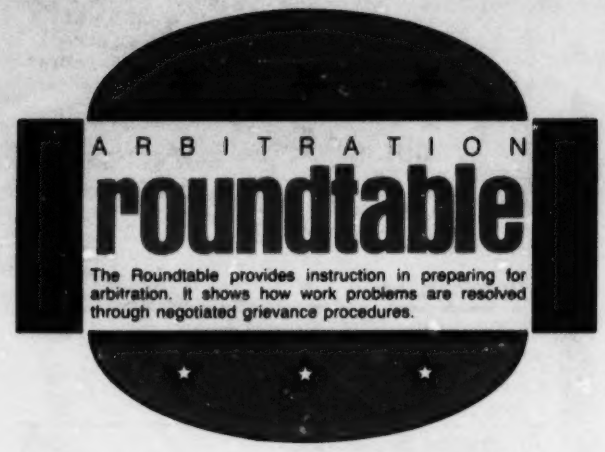

ARBITRATION
roundtable
The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

There Once Was a Union Maid

Casefacts: Local 1658, American Federation of Government Employees represented nonprofessional employees at the Army's Tank Automotive Command (TACOM) in Michigan. For many years, whenever management proposed a significant change in working conditions, it communicated directly with the local's president. The president dealt with the matter or named another representative to handle it.

Then the parties reached agreement on a new contract, effective October 1984. The standard no-discrimination clauses remained the same, but there was some different language in Article 7.

In Article 7 AFGE agreed to notify the employer promptly of any changes in its designated representatives. "Once every six months the union will give the employer an accurate roster of all officers and stewards. Such roster will list the representatives' organizational symbol and work telephone number. . .and inform the employer which steward is responsible for which activity by organizational symbol."

Some months before the new contract, the union elected a new president, a black female. Local 1658 charged that after that, to show its displeasure at the election, TACOM began trying to bypass the president by attempting to deal directly with lower-level union representatives.

Among the incidents cited by the union was one where the personnel director asked the union's vice-president to represent AFGE at a meeting with agency officials held in her representational area. Since this meant negotiating changes in personnel practices, the vice-president responded that the president must give prior approval to the vice-president's representation.

Those incidents were deliberate, AFGE maintained. After her election but before negotiations ended, the new president had written the personnel chief that all correspondence and actions involving labor-management activities initiated within the local must be approved by the local's president, or, in her absence, by the executive vice-president.

Moreover, when the parties reached accord on their new contract, (although it did not go into effect until two months later) the personnel director, who had been on the management team, sent supervisors a memo. The memo said that the parties contractually agreed that Local 1658 had designated its president as the representative to whom management would provide the notices required by law.

The employer denied the union's allegations, arguing that Article 7 in the new contract supplanted the past practice. Once the agreement was effective, TACOM could take up personnel matters directly with subordinate AFGE representatives, often without the knowledge of the union president.

The management attorney, who had been at the bargaining table, contended that such an intent was manifested in negotiations. When the arbitration hearing was recessed to permit her to produce notes or supporting documents, she reported back that no documentation existed. She and the union president ultimately agreed that during negotiations there was no indication that the management-proposed language would have the effect which TACOM now claimed for it.

Issue: Did the employer violate the contract by refusing to deal directly with the union president?

Award: Arbitrator Erwin B. Ellmann found for AFGE. Article 7, he held, did not control the union's right to select and designate its representatives for bargaining purposes, including the processing of grievances.

At the union's request, the employer must continue to direct communications concerning working conditions within the bargaining unit to the Local 1658 president, unless otherwise notified. The arbitrator retained jurisdiction to resolve any disputes on implementation of his award.

He found no hard evidence to support AFGE's charge of anti-black or anti-feminist discrimination, however strong the president's suspicions may have been. No such claims were contained in the union's formal grievance. Accordingly, the arbitrator refused to pass on these claims.

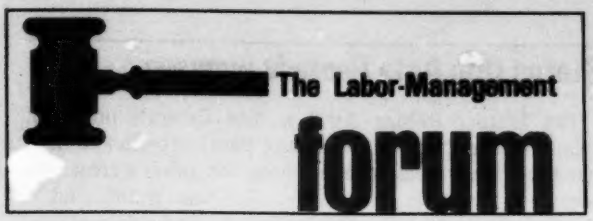
He ruled that nothing in Article 7 imposed limitations on the president's duties. While new, the language did not regulate AFGE internal affairs or alter the established practice of forwarding notices to the president. Such an interpretation was not discernible from the simple requirement that the union periodically list its representatives for the employer's information.

Arbitrator Ellmann said the contract language spoke for itself, quoting Justice Holmes that "There is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation but perversion."

The agreement accorded the bulk of official time to the president, which hardly indicated an intention to minimize the responsibilities of that office. Even assuming that AFGE could have legally surrendered its right to control its own representatives, it could not be presumed that it did so in the absence of a waiver.

Without a waiver and in the face of the union's request that matters be handled by its president, the arbitrator said, an employer's attempt to deal directly with individual workers not authorized to bargain on matters of general union policy might constitute a refusal to bargain.

The evidence suggested that TACOM's reliance on the contract was a pretense. The president's letter to management and the personnel director's memo to supervisors showed that management was to provide notices to the president. The employer was not justified in persisting in its attempt to circumvent the president's authority. (*TACOM and Local 1658, AFGE*, March 21, 1986. LAIRS No. 17191) ■



FLRA Seeks Comments on Privacy Aspect of Giving Home Addresses to Unions

The Federal Labor Relations Authority has asked interested parties to file *amicus* briefs on nine unfair labor practice cases involving the same issue: management's refusal to furnish the union with the names and addresses of bargaining unit members.

The Authority wants to look at whether disclosure of this data would be subject to the Privacy Act's "routine use" exception, an aspect FLRA had not previously considered. ("Routine use" means use of information consistent with the purposes for which the agency gathered the information.)

The Authority said three of the nine cases were waiting judicial review when it sought and was granted remand. In another case the U.S. Second Circuit Appeals Court denied the Authority's initial request for remand, reversed the FLRA ruling that the agency did not commit a ULP by refusing to give the union the names and addresses, and then remanded. (See *Consultant,* April 25, "SSA Must Release Employee Addresses to Union")

The cutoff date for the briefs is July 11. The Authority's announcement appeared in the *Federal Register* of June 12. ■

Picketing at SSA Was Not Unfair Practice, Authority Rules

After 11 members of the American Federation of Government Employees entered the reception area of a Social Security Administration office and paraded silently in a circle for 10 minutes, the agency filed an unfair labor practice complaint. It charged the union with illegal picketing.

The Federal Labor Relations Authority dismissed the complaint. Picketing is a ULP only if it interferes with agency operations, the Authority ruled, and here SSA suffered no inconvenience or interference.

The FLRA decision listed several factors to be considered in evaluating charges of illegal picketing:

—the government interest involved,
—the sensitivity of the function and its purpose,
—the location of the picketed operation,
—the duration of the picketing, and
—the number and conduct of the pickets.

SSA had learned the day before that the union planned a mass demonstration near the office. Anticipating that some demonstrators might try to enter the office, it took preventive measures. Management assigned all available claims representatives to interviewing so that no claimants would be kept waiting in the reception area. Two security guards were stationed in the room, and two clerks normally stationed there were moved to the main office.

The 17-by-70-foot waiting room was a public area accessible even to individuals who had no business with the agency. Occasionally street people entered the area and were allowed to sit there.

During the picketing, no employees were in the reception area except the receptionist and guards. One claimant entered the office and was escorted to the rear, and two others finished their business and left.

The Authority concluded that the record did not support a conclusion that the picketing appreciably delayed processing of claims. A factor in its decision was the small number of pickets and that they made no attempt to talk to SSA employees or interfere with their work. Under the particular circumstances of this case, the union action did not interfere with agency operations.

FLRA noted that this was the first time it had ruled on the question of whether picketing interfered with agency operations. If this had been a highly sensitive operation, such as one involving national security, the Authority might have reached a different conclusion. (*22 FLRA No. 7,* June 6, 1986) ■

Authority Considering Major Revisions of Four Regulations

The Federal Labor Relations held two meetings last month on major regulatory revisions it is considering. Interested parties were asked to submit comments by July 11. (See the June 10 *Federal Register)*

The first proposed revision concerned delegation of FLRA's authority to decide unfair labor practice cases to its administrative law judges. The second covered providing discovery in ULP proceedings.

The third revision would require federal agencies to include in their written assertions of nonnegotiability the specific reasons for making such assertions, including relevant citations. Labor organizations, in their petitions for review of negotiability issues, would include their specific arguments for the negotiability of the disputed proposals, including relevant citations.

The fourth proposed revision concerned FLRA'S establishment of a pilot program providing written negotiability determinations by FLRA staff members which would be appealable to Authority Members. ■

MSPB Acting Special Counsel Named

President Reagan has designated Lynn R. Collins as Acting Special Counsel at the Merit Systems Protection Board. Collins has been on the Office of Special Counsel staff since 1979. He was named Deputy Special Counsel by former Special Counsel K. William O'Connor, whose term expired June 3. Collins previously served at the U.S. Civil Service Commission. ■

Board Upholds Removal of SES Appointee

Concluding that agencies have authority to fire career Senior Executive Service members on charges of misconduct, neglect of duty or malfeasance, the Merit Systems Protection Board sustains the General Services Administration's removal of a regional director. This is the first time the Board has reviewed the dismissal of a career SES appointee.

MSPB had to decide whether the appellant's deficiencies constituted only poor performance. Under the Civil Service Reform Act, the Board said, SES members who are performing unacceptably can only be *demoted* to positions at the GS-15 level or higher. They cannot be completely removed from the service unless the action is based ultimately on misconduct, neglect of duty or malfeasance.

MSPB also had to determine whether the agency's motive for the removal action was reprisal for the employee's threat to disclose wasteful management practices.

In a two to one decision, the Board found that the appellant's repeated refusal to cooperate with higher level management and the ineffectiveness caused by his nonperformance of duties and disruptive actions constituted misconduct, neglect of duties and malfeasance. Member Johnson dissented, holding that GSA committed a prohibited personnel practice in taking the action because of the appellant's whistleblowing. (*Berube v. GSA*, MSPB Doc. No. DCO7528410055, May 20, 1986) ■

FLRA Finds Bargainable Union Proposal on 100% Official Time

The Federal Labor Relations Authority rules negotiable a proposal by the Overseas Federation of Teachers providing for 100 percent official time for two union representatives. In its decision, the Authority observed that the union already had one representative receiving 100 percent official time under the current contract, and the proposal would require the addition of only one full-time representative.

The Authority distinguished the circumstances of this case from those in *Wright-Patterson Air Force Base* in which it ruled a 100 percent time proposal bargainable only if the employer chose to bargain. Here the Department of Defense Dependent Schools failed to support its claim that the OFT bid would interfere with management's right to determine staffing patterns.

The employer argued unsuccessfully that it would have to hire more employees to cover the absence of an additional union representative. Teaching skills are often interchangeable, FLRA said, which allowed for the change of one teacher for another.

Management also contended that it was subject to personnel ceilings. The Authority concluded that the ceilings were not Congressionally mandated and there was no statutory limit on the number of teachers DODDS could hire. (*21 FLRA No. 81*, May 8, 1986) ■

Status Quo Ante Remedy Imposed

The Warner Robins Air Logistics Center's unilateral change in standards for evaluating travel expenses in high rate geographic areas without giving the union a chance to bargain on impact and implementation was an unfair labor practice, the Federal Labor Relations Authority determines.

Imposing a *status quo ante* remedy, FLRA ordered the employer to reexamine the travel vouchers, using the previous guidelines, and pay aggrieved employees accordingly. The employer and union had stipulated that the stricter standard of review resulted in disallowances amounting to $60,561.71.

The Authority also directed the agency to expunge from its records any admonishments given employees for disallowed expenses. Further, the center must use the previous procedures until Local 987, American Federation of Government Employees had an opportunity to bargain on the new standards. (*21 FLRA No. 120, May 29, 1986*) ■

[redacted]

(ALJ, *continued from page 1*)
mined that a disrespectful memo he sent to his supervisor was not wholly inappropriate because of the largely independent nature of ALJ work.

The Board upheld the other charges. The ALJ failed to show that the office procedures were unreasonable or that following them would impair his ability to give full hearings and render impartial decisions. MSPB found that his disruptive conduct and refusal to abide by established procedures was good cause for discipline. A two-month suspension was a reasonable penalty.

When the appellant challenged the Board's findings, the Federal Circuit examined the meaning of good cause in ALJ cases. The Administrative Procedures Act tries to insure the decisional independence of ALJ's and bars substantive review, the court said. Nevertheless, the act does not ban appropriate adminstrative supervision required for general office management.

If agency charges against an ALJ are based on reasons constituting improper interference with the employee's performance of quasijudicial functions, the charges cannot constitute good cause. In this case, however, substantial evidence supported MSPB's finding that there was no decisional interference. (*Brennan v. Dept. of HHS*, USCA Fed. Cir., No. 85-2477, Apr. 3, 1986) ■

Consultant

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Consultant

MSPB Rules That Enforced Leave Is Disciplinary Action

In removing from the workplace employees whose bizarre and threatening behavior may jeopardize the safety of themselves or others, agencies must follow adverse action procedures, including advance notification and an opportunity to reply. In this case, the Federal Aviation Administration's failure to do so entitled the appellant to three years' back pay.

This Merit Systems Protection Board decision departs from most former Board case law. Until now, MSPB (with one exception) allowed agencies to put on immediate enforced leave status employees whose physical or mental problems meant they were not ready, willing and able to perform their duties or who posed hazards in the workplace.

MSPB based its decision on recent Federal Circuit Appeals Court rulings and its own previous decision that enforced suspensions taken against the employee's will are inherently disciplinary. Hence, such agency actions must follow the formal procedures of 5 USC Chapter 75.

FAA had put the air traffic controller on enforced leave until he could be psychologically evaluated. His "bizarre and erratic behavior," the agency asserted, caused it to reasonably believe that he was a potential hazard to Air Traffic Control System safety. FAA later removed him.

In *Mercer v. HHS*, the Federal Circuit held that enforced leave was appealable to the Board where the leave was ordered pending inquiry or where retention on duty would be injurious to the employee, coworkers or the public. It was appealable regardless of whether the employee was ready, willing and able to work.

MSPB accordingly concluded that the appellant's enforced leave was a suspension within its jurisdiction. Further, his suspension and removal could not be sustained because FAA did not afford him the procedural protections of Chapter 75. (*Passmore v. Dept. of Transportation, FAA, and Office of Personnel Management*, Intervenor, MSPB Doc. Nos. SL07528510177 and SL07528510298, June 13, 1986) ■

Who Controls Union Solicitation in Public Areas of GSA Buildings?

Resolution of a union charge that the Health Care Financing Administration unfairly assisted a rival union hinges on whether HCFA or the General Services Administration controls access to public areas of the office building, the appeals court concludes. The court remanded the case to the Federal Labor Relations Authority for examination of GSA regulations.

The case started when the National Treasury Employees Union challenged the exclusive status of the American Federation of Government Employees at HCFA. AFGE asked the agency to deny the rival union access to the cafeteria, hallways and lobby.

The building was owned by GSA, and HCFA rented space. If HFCA had exclusive control over the public areas, management could not lawfully permit a rival union to leaflet or solicit membership. If GSA had ultimate control, HCFA had no say in the matter.

Acting on advice from GSA, HCFA told the incumbent union that it lacked authority to bar the other union from public areas. When AFGE filed an unfair labor practice complaint against the employer, the Authority dismissed the complaint. AFGE then asked the U.S. Court of Appeals for the District of Columbia Circuit to review the Authority's decision.

The court noted that a GSA regulation prohibits soliciting on GSA-controlled property, with a few exceptions. One exception is "solicitation of union membership or dues authorized by occupant agencies." The rule suggests, the D.C. Circuit said, that HCFA had authority to permit (or prohibit) NTEU solicitation in the building's public areas.

The Authority, however, had failed to construe the GSA regulation. Further, FLRA did not consider the extent to which, under past practice, the occupant agency actively participated in decisions on use of the public areas.

(*Continued on page 3*)

NEW Developments . . .

Enforced leave is disciplinary action, and agencies should give 30 days' notice . . . **1**

FLRA must decide whether GSA or agency authorizes union solicitation . . .

Arbitration Roundtable
Did National Archives violate contract by removing clerk? . . . **2**

Labor-Management FORUM
District court dismisses union's argument that RIF rules are invalid . . . **3**

Energy to bargain on RIF cost disclosure . . .

Panel sets 90-day limit on renegotiation of successor contract . . . **4**

Authority claims jurisdiction over noncompliance with adverse action arbitral awards . . .

ML 13:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

No Harmful Error, Arbitrator Says

Casefacts: The National Archives removed the grievant on charges of unsatisfactory performance. A nine-year employee, he was lead clerk at the Archives store. Over this period he always received satisfactory performance appraisals, and he had no disciplinary record.

Then a new supervisor was appointed to run the store. She greatly expanded the number of books and other items sold there, thus increasing sales by 60 percent. In the first six months on the job the supervisor sent the grievant 13 memos chronicling his various work performance deficiencies. She also gave him a written admonishment.

His major deficiencies included overages in his daily cash receipts (money exceeded receipts); difficulties in having the store open and ready for business with adequately stocked shelves and price tags on the merchandise; and failure to secure his cash box.

At a retraining session the grievant was advised that each customer must be given a receipt and that a rush of customers was no excuse for failure to provide a receipt. Soon after the supervisor observed him at work, and during a two-hour period he failed to provide 31 receipts.

In September the grievant and supervisor met for his quarterly performance review. Although she showed him her notes detailing areas where his work needed improvement, she did not give him a copy of the notes or a summary of the review. He was not given an improvement plan.

The clerk's problems persisted. He was suspended for three days when he left his assigned cash box unsecured and unlocked. The supervisor continued to send him counseling and other memos on his performance. His within-grade increase was denied.

His annual performance appraisal in January rated him as failing to meet four of the job's five critical elements. He was given an improvement plan listing seven areas which needed improvement. For 45 days he had weekly counseling sessions. When his work did not get better, Archives removed him.

Local 2578, AFGE charged the agency with harmful error by not complying with Article 19 of the contract in the removal action. The article required management to hold and document quarterly reviews, and to provide a written performance improvement plan immediately following the reviews.

The union also asserted that the employer did not prove its case by substantial evidence. In addition, the penalty was too harsh for a long-time employee with no prior record of poor work.

The grievant maintained that his inability to better maintain stock and cash balance was caused by understaffing in the store because of the increased sales, and by his being assigned more work than one person could properly handle. The many new items meant he had difficulty gauging the level of inventory needed since there was no established sales history.

His errors on the cash register and inventory control resulted from his hurrying because he was stretched too thin. The imbalances were much higher in periods when the sale figures were high.

Issues: Did the employer establish by substantial evidence that the grievant performed unsatisfactorily? Did it commit harmful error by breaching Article 13 provisions?

Award: Arbitrator Ira F. Jaffe denied the grievance. He found substantial evidence that the grievant performed at an unacceptable level and continued to do so even after an opportunity to demonstrate acceptable performance.

The grievant's frequent overages resulted largely from his failure to follow proper cash handling procedures. The increase in sales was not a defense, since management had the right to insist that he ring up all purchases at the time of sales. Without receipts, the agency had no accurate accounting of monies received and products sold.

In the arbitrator's judgment, the employer violated Article 13. Management did not provide the grievant with formal quarterly performance reviews until the one in September; it did not give him the supervisor's September notes; and it did not give him a written performance improvement plan immediately following the September review.

But after considering the circumstances, Arbitrator Jaffe ruled that these violations were not harmful. The grievant admitted having seen the supervisor's notes and being aware of the areas in which she deemed his work unacceptable. Accordingly, her failure to provide him with a copy of the notes was not harmful error.

Nor was the lack of prior reviews harmful error. Between the date the supervisor started and the grievant's September review, he had received 13 memos concerning his performance. This meant he had substantial notification of how the agency viewed his performance and how he could improve it.

After his September review, he received more memos on work deficiencies, a written explanation of why his increase was denied, and an annual evaluation in January. He had some retraining. Therefore, the agency's failure to provide him with formal quarterly reviews before September did not constitute harmful error.

The arbitrator recognized that the grievant had over nine years of good prior service, and that he simply continued to perform in a manner that agency supervision found acceptable until the new supervisor took over.

Nevertheless, the employer was entitled to insist that the clerk perform acceptably. It gave him appropriate notice and a chance to demonstrate acceptable work. It apparently considered reassignment or demotion, but concluded that neither was practical due to the grievant's inability to adhere to appropriate cash handling and office procedures. (*National Archives and Records Administration and Local 2578, AFGE*, February 3, 1986, LAIRS No. 17230) ■

The Labor-Management forum

Latest Round in RIF Rule Controversy

Federal unions lost their challenge to Office of Personnel Management reduction-in-force regulations which made performance ratings a key factor in retention decisions, effective April 10. The U.S. District Court for the District of Columbia dismissed the unions' plea that the rules be found invalid. The National Treasury Employees Union, however, says it will appeal the decision.

The American Federation of Government Employees, National Federation of Federal Employees, and NTEU objected because the rules replaced long-standing procedures giving major importance to seniority in layoffs. They had sought an injunction against a prior version of the rules issued last July, but the court rejected their motion. (See 10/25/85 *Consultant.*)

In its recent decision, the court observed that "the regulations, taken as a whole, appear clearly rational. Common sense suggests that the system as designed by OPM—if it works as expected—ought to result in the 'best' federal employees (who are not necessarily those of the longest tenure) being retained and rewarded." (*AFGE, NTEU, NFFE v. OPM,* USDC DC, Civil Action Nos. 85-2092, 85-2101, 85-2109, 85-3128, June 30, 1986) ■

Unauthorized Cruise Was AWOL

Because absence without leave adversely affects the efficiency of government service, the Federal Circuit Appeals Court holds, it provides the nexus required for removal under 5 USC 75. The court sustained the Merit Systems Protection Board finding that the Veterans Administration was justified in firing the appellant on AWOL charges.

VA had turned down the licensed practical nurse's request for annual leave to take a cruise since it could not spare her on those dates. She went on the cruise anyhow—after notifying VA that she needed emergency leave for a family crisis. A few days later a person identifying herself as the appellant's daughter called to say her mother was ill.

The Federal Circuit said that an essential element of employment is to be on the job when one is expected to be there. To permit employees to remain away from work without leave would seriously impede the agency's function.

The court noted that AWOL imposes burdens on coworkers and tolerating it would destroy their morale. And contrary to the appellant's argument, the AWOL was not excused by the employee's acceptable performance when she chose to appear.

The court also considered the appellant's past record which included a letter of reprimand and four suspensions for AWOL and tardiness. Management had counseled her on this and warned that disciplinary action could be forthcoming if her leave abuse continued. (*Davis v. VA,* USCA Fed. Cir., Appeal No. 86-549, June 4, 1986) ■

Authority Approves Bargaining on Disclosure of RIF Costs

The Department of Energy must negotiate on a union proposal that management provide the union with the costs of a RIF, such as administrative costs, severance pay, and pay retention, the Federal Labor Relations Authority decides.

The National Treasury Employees Union contended that the data was necessary to its representation of workers challenging RIF actions. NTEU also asserted it needed the data for future negotiation of contract provisions concerning RIFs. Energy argued unsuccessfully that the union bid did not concern the working conditions of bargaining unit members.

The Authority observed that it has consistently held that RIF matters concern conditions of employment. This was true here, even though the RIF costs might pertain in part to nonunit employees.

The Civil Service Reform Act requires federal employers to furnish the exclusive union with relevant and necessary data for its representational activities. The Authority held that Section 7114(b)(4) is a statutory floor and not a ceiling.

The section did not prevent a union from negotiating with an agency for disclosure of information on working conditions beyond what it was entitled to by the statute. The Authority added that the disclosure of such information must be consistent with law. (*22 FLRA No. 12,* June 12, 1986) ■

Safety Committee Is Bargainable

A National Federation of Federal Employees proposal providing that the joint safety and health committee would investigate unsafe working conditions referred to the committee is negotiable, the FLRA concludes.

The Authority dismissed arguments by the U.S. Attorney's Office that the proposal would interfere with management's reserved right to assign employees and work and to determine its internal security practices.

A second NFFE bid defined "emergency" as a situation imposing sudden, immediate requirements on the employer. This made the proposal nonnegotiable, FLRA said, because it would limit management's right to take any actions necessary to carry out the agency mission during emergencies. (*22 FLRA No. 13,* June 12, 1986) ■

(Solicitation, *Continued from page 1*)

If the Authority should decide that GSA regulations authorized HCFA to prevent use of public areas for union solicitation, then another question arose: What was HCFA's responsibility if GSA officials improperly permitted a rival union to utilize these areas?

The court directed the Authority to consider all these questions on remand. (*AFGE v. FLRA, NTEU, Intervenor,* USCA DC Cir., No. 85-1478, June 17, 1987) ■

Union Can't Request Court Review Without Employee Authorization

The U.S. Court of Appeals for the Federal Circuit rules that unless employees expressly authorize the union to represent them in seeking judicial review of Merit Systems Protection Board decisions, the labor organization cannot appeal their cases.

The American Federation of Government Employees was representing Commerce Department workers affected by a reduction-in-force. The workers signed authorization cards naming the union as their representative before the Board. When MSPB upheld the employer's action, the union sought court review.

The court questioned whether the petitioners had authorized the appeal. AFGE thought that the petitioners, by signing representation forms, understood and desired the union to represent them in any judicial appeals. The union attorney admitted that he had had no contact with them, but instead was hired by AFGE to represent them.

The law plainly creates an appeal right for "employees," Judge Archer said, and the union was not an employee. The court denied the petition because AFGE was not the proper party to appeal. (*Reid v. Dept. of Commerce*, USCA Fed. Cir., App. Nos. 85-2011/2281, May 30, 1986) ■

Panel Order Resolves Impasse

To settle a bargaining dispute between the National Weather Service and the National Weather Service Employees Organization, the Federal Service Impasses Panel orders the parties to adopt a slightly modified version of the employer's proposal on time limits for negotiations.

The parties, after bargaining for four years on their first master agreement, were at impasse over the length of time to be allowed for the negotiation of the successor agreement. They were also stalemated over whether the first contract should remain in effect until a successor contract was finalized.

The Panel-imposed language set a 90-day limit on renegotiation of the successor contract, exclusive of time necessary for help by the Federal Mediation and Conciliation Service and the Panel. If settlement was not reached at the end of this period, and FMCS and the Panel were not involved, either party could terminate any or all sections of the former contract.

The employer estimated that negotiations had so far cost about $201,000 for travel and official time. The figure would double if expenses for litigation, resource personnel, etc., were added.

Until they settled on the master contract, the parties were bound by regional agreements. Management complained that the absence of an agreement prevented it from implementing changes in government-wide rules. Moreover, the local agreements restricted certain management rights.

The union maintained that there was no need for contract wording on this issue. The "normal operation of law" required maintenance of the status quo until a new agreement was negotiated. The union would add two exceptions, however. First, at the expiration of the master contract either party could revoke any provision concerning a permissive subject of bargaining. Second, with proper notice the employer could implement any government-wide rule.

The Panel concluded that the employer's proposal, as modified, was a reasonable basis for settlement. The time limitation would be an incentive for the parties to complete negotiations in an expeditious manner. This would avoid the costs and delays experienced in the negotiations. (Case No. 86 FSIP 30, June 16, 1986) ■

FLRA Asserts Limited Jurisdiction Over Adverse Action Arbitration Awards

Ruling on the issue for the first time, the Federal Labor Relations Authority declares that it has jurisdiction to review, in an unfair labor practice proceeding, alleged noncompliance with an arbitration award concerning an agency's adverse action against an employee.

The Authority pointed out that the law requires that review of arbitration awards relating to adverse actions be made by the courts. In this case, however, the award was final and binding because the Office of Personnel Management had not sought judicial review. Further, FLRA was asked to review noncompliance with the award, not the award's substance.

The case began when an Army employee hit his supervisor. The arbitrator, finding provocation by the supervisor, set aside the grievant's removal. The employer then asked the arbitrator to modify the award by ordering some disciplinary action. After the arbitrator refused to alter the award, the agency suspended the grievant for 60 days for the conduct that originally led to his termination.

The American Federation of Government Employees filed unfair labor practices against the agency, alleging that the suspension was not in compliance with the award. The Authority agreed, and ordered the Army to fully comply with the award by revoking the suspension. (*22 FLRA No. 20*, June 23, 1986) ■

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DEPOSITORY

Incentive Pay Proposal May Be Bargainable, D.C. Circuit Rules

Reversing a Federal Labor Relations Authority decision, the U.S. Appeals Court for the District of Columbia Circuit says FLRA wrongly held that a union proposal dealing with incentive pay rates for above average performance conflicted with management's right to assign work.

When an Internal Revenue Service Center started an experimental incentive pay system, the National Treasury Employees Union proposed a formula for making payments under the system. FLRA concluded that the proposal was nonnegotiable because the right to assign work included the right to reward superior performance of assignments.

The court rejected FLRA's findings. The rights to assign and reward superior performance of assigned work, it wrote, might both be means to help IRS determine its work priority, "just as the carrot and the stick are both means of getting a donkey to move. But the similarity of purpose does not establish that when Congress says carrot it means stick as well..." FLRA's reasoning could render nonbargainable almost all rules on working conditions.

The court remanded the case. Since the Authority had not considered IRS arguments that pay is a matter provided for by statute and the proposal would restrict agencies' right to determine their budgets, it should do so now. (*NTEU v. FLRA*, USCA DC, No. 84-1292, June 20, 1986.) ■

No Violation of First Amendment Rights, Court Finds

By a two-to-one majority, the Federal Circuit Appeals Court upholds an arbitration award supporting the demotion and suspension of a Bureau of Prisons employee. The employee lost his argument that the discipline was in reprisal for his whistleblowing statements to the press, thus violating his First Amendment rights and the Civil Service Reform Act.

The arbitrator dismissed two of the three misconduct charges against the grievant, but upheld the third. The third charge concerned the grievant's failure to comply with agency standards of conduct by speaking to reporters about perceived corruption and malfeasance by the prison staff.

The arbitrator held that the employee's disclosures were not protected speech under the First Amendment. The record showed that his release of the statements was for personal reasons and not to inform the public of matters of concern.

The Federal Circuit applied the Supreme Court's 1983 *Connick* ruling to the Bureau case. In *Connick*, the high court found that a public employee must prove that his speech qualified as protected speech, and that such protected speech or activity was the motivating cause for management's adverse action.

The Supreme Court further ruled that if a public worker's public statements were a matter of legitimate public concern upon which free and open debate was needed, censure by the employer could not be condoned. If, however, the employee spoke on "matters only of personal interest, absent the most unusual circumstances," the court was not the appropriate forum for reviewing the wisdom of a public agency's personnel decision.

In addition, the appellate court pointed out that to receive whistleblower protection under 5 USC § 2302, an employee's primary motivation must be the desire to inform the public on matters of public concern, and not personal vindictiveness.

The Federal Circuit noted that in the Bureau case, neither party contested that the grievant's communications to the press were the "motivating" cause of his demotion. Hence, the grievant met the Supreme Court standard that his speech was the motivating cause for the discipline.

The appeals court then considered whether the grievant had met the Supreme Court's second standard: proving that his statements qualified as protected speech. The court concluded that he had not.

The arbitrator correctly determined that the grievant was motivated by personal reasons in releasing "stale" news and

(*Continued on page 4*)

NEW Developments...

Court remands FLRA decision banning bargaining on incentive pay... **1**

Employee vainly asserts that he is whistleblower with First Amendment rights...

Arbitration Roundtable

Did VA violate the contract by not training and promoting career ladder employee?... **2**

Labor-Management FORUM

Board dismisses pre-existing physical disability claim of probationary employee... **3**

Firefighter loses his unfair practice claim...

OPM revises FPM Chapter on labor-management relations **4**

Representational status entitles union to data, court finds...

PM 1.13:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Take Me to Your Ladder

Casefacts: In 1982 a WG-6 tractor operator at the Veterans Administration Medical Center decided to enter a new career ladder with greater potential for advancement. VA granted his request for a downgrade to a WG-5 maintenance helper job in the Engineering Service.

In February 1983 management advanced him to maintenance worker WG-8. The next higher position in his career ladder was maintenance mechanic WG-10. Maintenance workers usually learned the skills needed in their present and next higher position on the job while working with more experienced employees.

Article 34 of the VA-American Federation of Government Employees contract cited VA policy to provide training and career development opportunities to bargaining unit members. The agency was responsible for ensuring that employees got sufficient training to perform their job duties.

Section 17, Article 34 required supervisors to set a date on which to determine a career ladder employee's qualification for promotion to the next higher grade and to make that determination on the date specified. The grievant's supervisor failed to do this.

Local 2110, AFGE grieved, requesting that the employee be promoted to WG-10, retroactive to April 1985 when he received a "highly satisfactory" performance evaluation.

The union argued that the grievant's 1985 evaluation by his former supervisor established that he was already doing WG-10 work. If VA did not regard this evaluation as the formal determination required by Article 34, then it had violated the article by failing to set a determination date and formally determine the grievant's readiness for promotion. In that case, Section 17 required his promotion.

VA admitted its noncompliance with Section 17. That same section, however, made clear that failure to set determination dates and make formal determinations did not result in automatic promotion of a worker who—in management's judgment—was not yet qualified for a higher job.

Management contended that the grievant's latest April 1986 performance rating showed he did not yet have the skills needed for the maintenance mechanic position. The employer added that efforts were underway to correct past neglects regarding his training and development.

There was confusion as to the exact duties performed by a WG-10 maintenance mechanic in Engineering Service in the grievant's location. The position was currently unfilled. Although the assistant division chief, the grievant's former supervisor and the grievant testified on the duties, each person's testimony was inconsistent with the others.

Issue: Did the agency violate Article 34 by not promoting the grievant to the position of maintenance mechanic?

Award: Arbitrator Herbert Oestreich held that under Section 17 and Federal Labor Relations Authority rulings, he had no authority to award the promotion of a worker who in management's judgment did not yet have the necessary skills for the next higher position in his career ladder, even when the contract was violated.

He found that VA breached the contract by not following Article 34 procedural requirements. It also failed to comply with Article 30 by not providing adequate training for the future duties of the WG-10 position it *now* had in mind for the grievant.

The contract did not, however, prohibit the arbitrator from finding other remedies. He ordered VA to take certain corrective steps within 60 days, noting that the agency's confusions and neglects hampered proper on-the-job training for the grievant and his development for advancement.

While the former supervisor was highly supportive of the grievant and encouraged the career change, the supervisor failed to set an evaluation date and formally determine the employee's qualifications for a higher position as required by Article 34. The confusion was compounded by a number of temporary replacements when the supervisor retired.

In 1985 the supervisor rated the grievant as highly satisfactory and already performing some duties at the maintenance mechanic level. Nevertheless, this was a rating of the grievant's performance as a GS-8, rather than an adequate determination of qualifications for the higher position.

Even if it were a determination, it could only have been a recommendation subject to approval by higher management. Higher management never approved such a recommendation and did not now regard the grievant as ready for promotion.

There was lack of clarity on the exact duties to be performed by a maintenance mechanic in this division in this location. This hampered on-the-job training for the grievant and his development for advancement.

As a remedy, VA must conduct a job analysis of the WG-10 maintenance mechanic position in the Engineering Service. It must prepare a position description accurately describing the specific duties and skill requirements anticipated in this particular position in this particular location.

Management must communicate in writing to the grievant and his immediate supervisor the specific duties he would be expected to perform if promoted to the WG-10 job in engineering service in this location, and the specific skills he would need to possess to perform the duties of that position.

Further, the VA must develop a plan, including a time table, for further training and development of the grievant to aid him in qualifying for the maintenance mechanic job. This plan must be communicated in writing to the grievant and his supervisor. The supervisor must set a determination date according to Article 34 provision. (*VA and Local 2110, AFGE*, June 1, 1986, LAIRS No. 17394) ■

The Labor-Management forum

MSPB Reports on "Getting Involved"

The Merit Systems Protecton Board is issuing a report called *Getting Involved: Improving Federal Management with Employee Participation.* The report stems from the Board's conclusion that potential whistleblowers may be deterred from reporting problems and abuses because of what they view as inadequate protection against reprisal for their actions.

MSPB reasoned that agency heads should be encouraged to explore alternative methods of encouraging constructive employee involvement in identifying or resolving fraud, waste, or mismanagement. The study summarizes management systems which involve workers in identifying or resolving organizational or operational problems.

The systems reported most frequently by the 25 agencies surveyed were telephone hotlines, employee suggestion programs, and Quality Circles. Quality Circles, MSPB says, is a rapidly growing phenomenon which deserves a closer look by federal managers and policymakers.

The chapter on Quality Circle programs discusses a number of subjects: structure; union involvement; areas barred from Quality Circle involvement; size and scope; program promotion; management involvement; training, resource allocation and agency interaction; program interaction with the private sector; and benefits, costs, shortcomings and areas for improvement.

The study will be released after August 15. For information on obtaining a copy, call MSPB at 202/653-7208. ■

Ill-Suited for Job, FLRA Holds

The Norfolk Naval Station's suspension of a union president who refused to wear his firefighter dress uniform to a negotiating session was not an unfair labor practice, the Federal Labor Relations Authority finds. FLRA dismissed the Federal Firefighters Association's charge.

Navy rules make mandatory the wearing of a standard blue uniform (without a tie) during normal firefighter work periods. Adding a tie makes it a "dress" uniform which must be worn for official business involving contact with base officials or the public. Building N-26 at the base is specified as one where dress uniform must always be worn.

The union president was scheduled to attend the session in N-26. His supervisor ordered him to wear dress uniform and to ride to the meeting with the supervisor in a government car. The FFA official refused, arguing that he was attending the meeting as a union representative, not as a firefighter.

The president ignored the supervisor's warning that if he disobeyed he would be leaving the station unauthorized. He left in civilian clothes and rejected transportation. Management gave him a three-day suspension.

FLRA determined that the employer had a legitimate safety reason for its requirement, especially since it applied only to employee/negotiators who were on call during bargaining. The suspension was not in retaliation for the president's union activity, as alleged, but rather for his refusal to obey a direct order. (*22 FLRA No. 32,* June 30, 1986) ■

Bargainability of Access to PX

The Antilles Consolidated School System may elect not to bargain on five union proposals giving members of the bargaining unit access to the activity's post exchanges, recreational facilities and hospitals, the Federal Labor Authority rules, because the proposals do not deal with working conditions. In a lengthy analysis, FLRA discusses factors which determine whether a bid involves a condition of employment. (*22 FLRA No. 23,* June 24, 1986) ■

MSPB Rules on Pre-existing Physical Disability

A probationary employee failed to convince the Merit Systems Protection Board that his removal was invalid in that the Navy did not follow procedures on termination of probationers for conditions arising before appointment. He asserted that his discharge resulted from a physical disability which existed before his hiring.

His unsatisfactory attendance record, he said, stemmed from his use of leave for medical treatment. Navy evidence, however, established that he was removed for abuse of emergency annual leave.

MSPB noted that 5 CFR § 315.805 deals with termination of probationers for reasons based on conditions arising before their appointment. The procedural safeguards do not apply to physical conditions predating employment which affect an employee's performance. A pre-existing physical disability is specifically excluded from the concept of a preappointment reason.

Further, the appellant's allegation of handicap discrimination did not in itself render his termination an appealable matter. Probationers terminated for *post appointment* reasons have the right to appeal only when they allege discrimination based on partisan political reasons or marital status.

Accordingly, the appellant's petition did not meet MSPB criteria for review. The Board dismissed his appeal for lack of jurisdiction. (*Holloman v. Navy,* MSPB Doc. No. PH315H8610187, June 18, 1986) ■

Court Says Union Has Right to Data

Calling the Federal Labor Relations Authority's reading of the law "flatly wrong," the appeals court tells FLRA to reconsider its dismissal of a union-filed unfair labor practice charge. The court held that the union's representational status entitled it to information on employees who were fired, even though it did not know their names nor did they ask for union assistance.

The case began when Local 1345, AFGE heard rumors that an Army Exchange had fired two workers. Management denied AFGE's request for data on the incident, asserting that release of the information would violate the Privacy Act.

The Authority upheld management's refusal on the grounds that Local 1345 did not know the identities of the employees and was not asked to represent them in a grievance. Under these circumstances, FLRA held, the union had no representational function to perform.

The U.S. Appeals Court for the District of Columbia stressed the union's duty to represent *all* employees in the bargaining unit. To fulfill this responsibility AFGE needed data on disciplinary dismissals of unit members.

Labor law obliges employers to supply information needed by the exclusive union to negotiate and administer an agreement. First, because the union represents potentially aggrieved employees and needs data to know whether to file a grievance and to inform them of procedures.

Second, the union represents all unit members, and a policy established in connection with a particular personnel action may affect employees beyond those immediately involved. Third, the union has a legitimate concern with its own status as the exclusive bargaining representative.

Judge Edwards wrote that when these elements are considered, AFGE's request for data on the terminations was reasonably necessary for full and proper discussion, understanding and negotiation. The union's request was not overbroad, nor did the employer make such a claim to FLRA.

The court made no decision as to whether release of the information might be unlawful under the Privacy Act since the Authority had not done so. FLRA was free to take up this issue on remand. The D.C. Circuit warned, however, that FLRA must carefully balance the interests involved, and that the law tilted toward disclosure. (*AFGE v. FLRA*, USCA DC Cir., No.85-1378, June 27, 1986) ■

IRS Must Obey Authority's Order

The Internal Revenue Service must comply with the *status quo ante* remedy imposed by the Federal Labor Relations Authority in December 1983, the U.S. Court of Appeals for the District of Columbia Circuit declares.

IRS committed an unfair labor practice by unilaterally decreasing the duty tours of When-Actually-Employed workers without giving the National Treasury Employees Union a chance to bargain. The Authority ordered IRS to restore the previous schedule and to make whole the employees for loss of pay and benefits. When the agency did not comply, FLRA and NTEU went to court. (*FLRA, NTEU v. Treasury, IRS*, USCA DC Cir., No. 85-1092, July 6, 1986) ■

Choice of Furlough Is Negotiable

The Federal Labor Relations Authority finds negotiable a union proposal under which employees would have the right to decide whether their furloughs would be discontinuous or continuous. Continuous furloughs would provide them with a basis for claiming unemployment compensation, thus mitigating the loss of wages caused by the furlough.

The Office of Personnel Management argued unsuccessfully that the Local 32, AFGE proposal conflicted with management's right to determine budget and to layoff and retain workers. FLRA noted that the bid would interfere with management's right to assign work because OPM could not assign employees during the furlough period. Nevertheless, because the interference would not be excessive, the proposal was an appropriate arrangement.

The Authority also concluded that the proposal would not have a detrimental impact on the achievement of efficient government operations, even though OPM would have to pay any unemployment compensation granted furloughed workers. (*FLRA No. 29*, June 30, 1986) ■

FPM Chapter 711 Is Revised

The Office of Personnel Management has revised Federal Personnel Manual Chapter 711 on Labor-Management Relations. The new chapter, dated June 24, 1986, reflects changes called for by the Civil Service Reform Act. It also incorporates and revises material previously contained in FPM Supplement 711-1 and FPM letters. ■

(1st Amend. rights, *continued from page 1*)
airing his personal complaints. The Bureau also showed that he had a propensity for making at least some baseless public allegations against the agency.

Under the circumstances, Judge Miller wrote, "We cannot fault the arbitrator's determinations that the grievant's suspension would promote the efficiency of the service." The court affirmed the Bureau's adverse actions.

Judge Newman dissented. In his opinion, the employer wrongfully suspended and demoted the grievant, in violation of the right of freedom of speech guaranteed by the First Amendment and 5 USC. (*Fiorillo v. Justice, Bur. of Prisons*, USCA Fed Cir., App. No. 85-1955, July 2, 1986) ■

Consultant

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The Federal Labor-Management and Employee Relations

Consultant

FLRA Restricts Scope of Arbitration Awards in Contracting-out Disputes

In its first decision on what remedies arbitrators can impose if federal agencies fail to comply with law and regulation when deciding to contract out agency functions, the Federal Labor Relations Authority holds that arbitrators cannot order cancellation of management's action. They may, however, order management to reconstruct its decision.

For arbitrators to substitute their judgment for that of the agency, FLRA said, would violate management's statutory right to contract out. Federal policy relies on private enterprise to supply commercial products and services except when comparative cost analysis shows that procurement from a private source is not as cost effective as in-house performance.

FLRA ruled that arbitrators can consider grievances challenging a contracting-out decision only on the basis that the agency failed to comply with mandatory provisions of procurement laws or regulations. Procurement provisions must be specific enough to permit arbitrators to judge whether the agency complied with them.

If arbitrators find a failure to comply, the Authority held, they can sustain the grievance. If the noncompliance materially affected the final procurement decision and harmed bargaining unit workers, arbitrators can order reconstruction of the procurement action.

The employer must reconstruct the process in accord with provisions not previously complied with. It must then decide whether the original decision to contract out could still be justified under contracting law and rules. If the decision could longer be justified, the agency must determine whether considerations of cost, performance and disruption override cancelling the procurement, and then take appropriate action on the basis of that determination.

The case began when the Blytheville Air Force Base decided to contract out maintenance functions. Local 2840, AFGE grieved, asserting that the base failed to consider wage inflation and the cost of security clearances for contract workers. Management claimed that the grievance was not arbitrable and that the arbitrator's order to void the procurement action was contrary to law.

The Authority rejected the employer's arbitrability argument. For some years, FLRA had ruled that grievances on this issue were arbitrable and the Supreme Court had upheld this policy. The Authority voided that part of the award cancelling the procurement action and substituted the reconstruction remedy. (*22 FLRA No. 72*, July 23, 1986) ■

NEW Developments . . .

In contracting-out cases, arbitrator can't cancel management action, FLRA says . . . 1

On court remand, Authority rules that RIF competitive areas are not negotiable . . . 1

Arbitration Roundtable 2
Did agency breach contract by refusing leave without-pay to temporarily disabled employee? . . .

Labor-Management FORUM 3
FLRA overturns arbitration award . . .

Court finds no Constitutional violation in travel limitation rule . . .

Board re-issues rules on practice and procedures . . . 4

President nominates Wieseman for MSPB Special Counsel . . .

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DEPOSITORY 376

Authority Reiterates Bargaining Ban

Acting on court remand, the Federal Labor Relations Authority reaffirms its original ruling that a Local 32, AFGE proposal to the Office of Personnel Management on reduction-in-force competitive areas was not negotiable. The reason for FLRA's turndown was that the proposal would directly affect both members and nonmembers of the bargaining unit.

Last October the District of Columbia Appeals Court found the Authority's rulings on the Local 32 proposal and a similar Local 29, NFFE proposal to be inconsistent with an earlier FLRA ruling on the same issue. The court told FLRA to clarify the last two decisions.

In the first FLRA decision, *Association of Civilian Technicians and Pennsylvania National Guard*, the union proposal limited the RIF competitive area to unit members. The Authority found this negotiable, rejecting Guard arguments that the bid directly affected working conditions of nonunit members by preventing them from competing in a RIF with unit technicians.

In its reaffirmation that the Local 32 proposal was not negotiable, FLRA discussed the four major issues raised by the D.C. Circuit.

1. Negotiability of proposals affecting employees outside the bargaining unit. FLRA distinguished "permissively negotiable proposals" affirmatively establishing a working condition for nonunit employees from (*Continued on page 4*)

Pm 1.13:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

No Right to LWOP

Casefacts: The grievant had been a food service worker at a non-appropriated fund restaurant at the Rock Island Arsenal for two and a half years. On December 31, 1985, he was in an automobile accident which fractured his left arm in several places, broke six ribs, and punctured a lung.

After using up his sick and annual leave, he applied for three months' leave without pay from February 1 to May 1. Instead, management put him on LWOP for two and one-half months, on absence-without-leave for a month, and eventually terminated him for inability to perform job duties.

His doctor first advised that the grievant could not return to normal, two-handed work for about four months, but later said six months provided the fracture healed at the usual rate. The doctor said the employee could, however, return to one-handed work sooner. In fact, it was not until September that the doctor released his patient to work, with the proviso that he not lift over 40 pounds.

Management determined that no one-handed job was available. A fitness for duty examination by an Army doctor showed that the grievant was unable to satisfy his job requirements. The physician recommended that the employee be fired.

Article 17 of the Arsenal's contract with Local R7-72, National Association of Government Employees says employees "may" be granted LWOP for illness or disability not of a permanent nature when sick leave has been exhausted. Under Article 20, a detail cannot exceed 120 days.

An Army regulation requires management to consider such solutions as reassignment or LWOP when a worker becomes physically incapable of performing assigned duties. If none of these are appropriate, the worker "will be separated as disqualified."

The regulation allows the employer to grant LWOP for illness or disability not of a permanent or disqualifying nature. Before approving extended LWOP, management must determine that the employee expects to return to duty and that a benefit will accrue to the activity, such as protection or improvement of the employee's health or the retention of a desirable employee.

The union contended that the employer violated both the agreement and Army rules by failing to grant LWOP to the grievant until he recovered from his injuries or to reassign him to light duty. NAGE also alleged that the employer was motivated by personal animosity and anti-union bias because the grievant was a union steward. In NAGE's opinion, the employer made no serious effort to find a light duty job for him until he recovered from his injuries.

Management asserted that two supervisors toured the restaurant's facilities to see if there were an available job that could be performed with one hand. Unable to locate such a job, they asked the personnel department to continue the search among other non-appropriated fund positions. The employee relations specialist testified that the extended job search was unsuccessful.

The employer maintained that it was necessary for the grievant's job to be performed by a regular, full-time employee. The position, which required heavy lifting, could not be left open indefinitely until the grievant recovered fully.

Moreover, since the contract limited temporary assignments to 120 days, management would have had to assign another worker to the grievent's job every 120 days. If he had not returned to work until September, this meant assigning, training, and returning three workers to their usual jobs.

Issue: Did the employer comply with Article 17 of the agreement and Army regulations when it removed the grievant?

Award: Arbitrator Julius Rezler denied the grievance. Both Article 17 and the regulation gave *discretionary* power to the employer in granting LWOP. Accordingly, as long as the employer acted in good faith and in the interest of the service, it did not violate the contract by refusing to extend the grievant's LWOP beyond March 20.

The fact that the supervisor requested the grievant's separation prior to the conclusion of the search for a light duty job indicated management's failure to seriously consider the possibility of light duty assignment. However, although there were light jobs which he might have filled, the union failed to show that any were vacant and so disprove the employer's contention that such a job was not available at the time of the search.

Arbitrator Rezler concluded that because of the indefiniteness of the grievant's return and the contractual restrictions, management was justified in terminating his employment. Neither the grievant nor his doctor were able to state with reasonable certainty an exact time of his return to his regular job.

The arbitrator agreed with the employer that to remove several employees from their permanent jobs, train them for the grievant's position, and return them to their previous jobs after a 120 day detail would cause dislocations and inefficiencies in the restaurant's operation.

The arbitrator found no evidence of personal or union bias by the employer. The grievant had been steward for only two months and filed no grievances during this time. Thus, management had no cause to be apprehensive about his union activities.

The award held that although management committed several procedural errors in processing the separation, the errors were not harmful enough to warrant the reversal of an otherwise justified personnel action. (*Local R7-72, National Association of Government Employees and Department of the Army, Rock Island Arsenal,* January 3, 1986, LAIRS No. 17084) ■

The Labor-Management forum

Court Upholds FLRA Ruling

Dismissing the union's negotiability plea, the Fifth Circuit Appeals Court says that if the American Federation of Government Employees wants to challenge the validity of a government-wide regulation there are other means available than by raising it as a labor relations issue.

The AFGE proposal called for two weeks' advance notice of changes in shifts or workweeks. The Agriculture Department refused to bargain, asserting that the bid conflicted with an Office of Personnel Management regulation.

The union acknowledged that its proposal was inconsistent with the OPM rule and that its petition was "a somewhat unusual vehicle to contest, in effect, the legality of an agency rule." It argued that the regulation was contrary to the law it implements, 5 USC § 6101(a)(3).

OPM's regulation authorizes agencies to revise employee workweeks if the agency knows, at any time prior to the start of the workweek, that the scheduled hours do not fit the employer's current needs.

The union appealed the negotiability issue to the Federal Labor Relations Authority. The Authority found that the proposal violated the OPM regulation. Under 5 USC § 7117, agencies have no duty to bargain on matters inconsistent with law or government-wide regulation.

The Fifth Circuit held that although FLRA enforces federal sector labor law, it has no power to decide the legality of another agency's government-wide regulation. The Authority, by holding the AFGE proposal nonnegotiable, properly performed its congressionally mandated role. (*AFGE v. FLRA*, USCA 5th Cir., No. 85-4541, July 21, 1986) ■

Management Can't Bargain Away Its Rights

The Federal Labor Relations Authority overturns an arbitrator's ruling that the Southwestern Power Administration violated the contract when a supervisor performed duties normally performed by bargaining unit employees. Although the arbitrator found that the employer contractually waived its right to assign work, FLRA held that reserved management rights cannot be waived or relinquished through collective bargaining. (*22 FLRA No. 48*, July 9, 1986) ■

A Question of Credibility

Adopting the administrative law judge's recommendations, the Federal Labor Relations Authority says that the Veterans Administration clinic reneged on its oral agreement with the union to establish a lunch break area, thus committing an unfair labor practice. The Authority's decision hinged on credibility findings made by the ALJ.

The Authority explained that the demeanor of witnesses is an important factor in resolving credibility issues, and the ALJ had the advantage of observing the witnesses while they testified. FLRA would not overrule an ALJ with respect to credibility unless a clear preponderance of evidence showed the ruling was incorrect. (*22 FLRA No. 40*, July 9, 1986) ■

Sometimes I Live in the Country

Did the Secret Service rule limiting the right of its Uniformed Division agents while on sick leave to travel outside the Washington, D.C. metropolitan area violate the constitutional right to travel? No, the Federal Circuit Appeals Court determines, because the regulation met the "rational basis test."

The rule provides that Secret Service members on sick leave cannot leave the broadly-defined metropolitan area without permission. The Merit Systems Protection Board had found that the regulation was not an impermissible burden on the appellant's travel rights, and that the Treasury Department properly removed him from his job as Secret Service agent for violating agency policy.

The appellant, on unpaid leave status while recovering from an injury, sought authorization to spend a week at the beach in Ocean City, Md. His superiors denied permission, instructing him not to leave the metropolitan area. He nevertheless went to Ocean City.

Agency officials staked out the agent's D.C. area home. When no one answered their repeated phone calls, they drove to Ocean City and photographed him on the beach. At later investigatory interviews the appellant refused to answer questions. He also signed a statement that he was not in Ocean City on the relevant dates.

The Service charged him with three counts: failure to comply with regulations; insubordinate refusal to comply with a supervisory directive; and falsification of fact and failure to reply to questioning during an official investigation.

The employee contended that his constitutional rights were violated. He also argued that management's denial of his request to leave the D.C. area and the surveillance were in reprisal for a grievance he had filed and his union activities.

Under the rational basis test, to be constitutional the regulation must be rationally connected in a non-arbitrary fashion to an agency's interest in fostering public safety by contributing to the agency's efficient operations.

The rule's narrow restriction, Judge Swygert wrote, was rationally related to the Service's function of protecting the president and other government employees. To do this efficiently, the Service must have access to trained manpower. It must be able to regulate the departure from the area of agents on sick leave in case they are needed for emergency duty. The Service also needs to assure that employees do not abuse sick leave.

The Service regulation could rationally be applied with equal force to officers on unpaid and paid sick leave. The rule confined them to a broad geographical area and did not, on its face, restrict their free exercise of other fundamental rights.

(Continued on page 4)

MSPB Special Counsel Nominated

The President has nominated **Mary F. Wieseman** as Special Counsel of the Merit Systems Protection Board, pending approval by the Senate. Wieseman has served as Inspector General for the Small Business Administration since May 1983. Prior to that she was acting general counsel for the Legal Services Corporation, partner in a Maryland law firm, and an attorney with the Department of Health, Education and Welfare (HHS) and the Department of Justice. ■

Board Issues Final Regs on Enforcement of Orders

The Merit Systems Protection Board has republished its entire 5 CFR Part 1201 rules of practice and procedure in the *Federal Register* of July 10, 1986. The Board says these republished rules will eliminate any confusion caused by improper structure or text resulting from earlier piecemeal changes and temporary pilot programs. The final regulations also modify the interim rules on enforcement issued earlier this year. (See *Consultant*, March 14, 1986, p. 4.) ■

Ban, (*Continued from page 1*)

"manditorily negotiable proposals" affecting working conditions of nonunit employees to a lesser degree.

2. Departure from private sector approach. The court had commented that FLRA opinions in *Local 32* and *Local 29* were at odds with the private sector principle that a proposal covering terms and conditions of employment was within the employer's duty to bargain, despite its potential effects on third parties.

In response, the Authority emphasized that Congress did not intend federal sector labor relations to be a mirror image of the private sector scheme. Instead, FLRA must balance the union's right to negotiate working conditions of unit members with the agency's right to set conditions of employment of nonunit members.

In the *Local 32* remand, FLRA had to determine whether the impact of Local 32's proposal was "so intrinsically related to the working conditions of nonunit employees as to invade the purview of other unit representatives" or require OPM to act in a way significantly affecting the rights of nonunit workers. FLRA decided management was not required to bargain. If, however, the proposal had only a limited, indirect effect on the interest of nonunit members, it would have been bargainable.

3. Previous bargaining by agency on a similar proposal. The Authority noted that it had never held that bargaining on competitive areas was prohibited—just that it was a permissive subject of bargaining. This meant OPM could bargain on a permissive subject in one set of negotiations and refuse to bargain in a later set.

4. FLRA's holdings concerning competitive areas in the Local 32 and ACT cases. The Authority distinguished between its *Local 32* and *ACT* decisions. Since OPM regulations barring definition of competitive areas in terms of positions did not apply to the National Guard, ACT and the Guard could bargain on RIF competitive areas.

Even though the ACT proposal would indirectly impact on nonunit employees, it did not otherwise actually prescribe a RIF competitive area for nonunit workers. Accordingly, the ACT proposal did not directly determine working conditions for nonunit employees. The Local 32 proposal, however, would have directly determined working conditions of nonunit employees and OPM could elect not to bargain on it. (*22 FLRA No. 49*, July 9, 1986) ■

Right to Travel, (*continued from page 3*)

Then, finding the appellant's claims of reprisal to be without merit, the Federal Circuit upheld the Merit Systems Protection Board ruling. (*Hambsch v. Treasury, U.S. Secret Service*, USCA Fed. Cir., App. No. 85-2681, July 3, 1986) ■

Criminal Violation Via Computer

The Merit Systems Protection Board rejects an employee's appeal from his firing on charges of using a computer to alter Air Force contracts, get unauthorized records, and submit false invoices with the result that he received $17,738 in Treasury checks. The Board was unpersuaded by the appellant's defense that he did this to point out deficiencies in the employer's bookkeeping system.

The employee also claimed that management improperly decided he committed a criminal-type offense. Also, the agency erred by invoking the Chapter 75 crime provision to shorten the advance notice of his removal from 30 to 10 days.

MSPB ruled that the employer had reasonable cause to believe a criminal violation occurred, thus satisfying the requirement for a shortened notice period. The nature and seriousness of his misconduct destroyed his credibility with his supervisors and throughout the agency and warranted his removal. (*Sawyer v. Air Force*, MSPB Doc. No. DEO7528610024, July 9, 1986) ■

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DEPOSITORY 32

Harmful Error Rule Does Not Apply to Short Suspension, FLRA Says

Arbitrators ruling on suspensions of 14 days or less are not bound by the harmful error rule, the Federal Labor Relations Authority determines. So finding, the Authority sustained the arbitration award.

Under § 7701(c) of the Civil Service Reform Act of 1978, an agency's decision to take adverse action cannot be sustained if there was harmful error in the application of agency procedures when management arrived at the decision. According to the Merit Systems Protection Board definition of harmful error, the error must have caused substantial harm to an appellant's rights. Without the error, the agency might have reached a different conclusion.

FLRA held that the harmful error rule, as it pertains to disciplinary actions, applies only to the more serious adverse actions listed in § 7512. Serious adverse actions include suspensions of more than 14 days.

In this case, the Authority ruled, the suspension was not covered by § 7512 and the harmful error rule did not apply. The arbitrator had reversed the suspension because he found a violation of the contract by the Social Security Administration. (*22 FLRA No. 66*, July 17, 1986)

The Authority upheld another arbitration award which reduced a 14-day suspension to an oral reprimand. Here the arbitrator found that the suspension was not for just cause. The U.S. Customs Service contended that he should have applied the standards of review mandated by law for § 7512 actions.

NEW Developments...

Court reluctantly upholds Board's dismissal of appeal... 1

Harmful error rule and § 7701 standards do not apply to short suspensions... 1

Arbitration Roundtable
Was employee aware of husband's fraudulent statements on application for car-pool parking space?... 2

Labor-Management FORUM
FLRA orders U.S. Army Corps of Engineers to furnish union with data on minority workers... 3

Bookshelf 3

AFGE did not violate duty to fairly represent when it refused to take case to arbitration... 4

Offering employee choice of negotiated or agency grievance procedure was unfair... 4

FLRA disagreed. Section 7701(c) standards apply *only* to § 7512 actions, and this was not a § 7512 action. Further, unless a specific standard of proof or review is required, arbitrators can establish whatever standard they consider appropriate. FLRA will not find an award deficient on that basis.

The Authority rejected Customs' additional argument that the arbitrator should have applied the harmful error rule. FLRA repeated its *22 FLRA No. 66* finding that the rule did not cover suspensions of 14 days or less. (*22 FLRA No. 68*, July 17, 1986) ■

The Unhappy Tale of a Federal Employee

The Merit Systems Protection Board did not abuse its discretion by rejecting a letter carrier's request for approval of either a delayed appeal or the reopening of his initial appeal, the U.S. Court of Appeals for the Federal Circuit rules. The court decision means the employee cannot contest his removal.

The Federal Circuit called this "the somewhat unhappy tale of a federal employee apparently whipsawed between the MSPB and the arbitrator, both deciding that they would not hear the petitioner's case on the merits since he had also sought relief from the other tribunal."

The U.S Postal Service had notified the carrier that he would be removed on July 2, 1984. The notice said he could appeal to MSPB within 20 days of removal or by using the negotiated grievance-arbitration procedure. If he appealed to MSPB, he would waive access to arbitration.

The employee appealed to the Board in July. In September his union wrote MSPB that he was terminating his appeal because he had decided to grieve instead.

The carrier's case went to an arbitrator who refused to review the removal. The award held that the grievant's MSPB appeal, even though withdrawn, barred the arbitrator from assuming jurisdiction. The law says an employee may contest an adverse action under the negotiated procedure or to MSPB, but not both.

(Continued on page 4)

PM 1 13:

ARBITRATION
roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Parking Permits and Penalties

Casefacts: The Warner Robins Air Logistics Center granted parking places "A" to car-pools of four or more people and parking places "B" to those of two or more. Although an employee's application for a parking permit had to list all car-pool members, only the applicant had to sign it.

In 1984 the grievant's husband received an "A" parking permit. He listed himself, the grievant and two fictitious employees as members.

In 1985 the agency started a reserved parking policy whereby car-pools of three or more entitled the permit holder to a reserved parking space where no one else could park. All members had to sign the application acknowledging receipt of the car-pool rules.

The grievant then applied for a reserved parking permit. She listed herself, her husband and a coworker on the application form as car-pool members.

The employer discovered the false names on the husband's "A" permit. Further, the grievant and her husband were members of two car-pools—an abuse of procedures.

Management suspended the husband for three days and revoked his base driving privileges for a minimum of two years. An arbitrator denied his grievance. The agency also revoked, but later reinstated, the coworker's driving privileges.

The agency revoked the grievant's base driving privileges for a two year minimum and proposed to reprimand her. The employer later cancelled the reprimand but refused to reinstate her base driving privileges.

The parties' contract stated that disciplinary actions "shall be based on just cause and in accordance with applicable regulations." A section on reserved parking listed penalties ranging from a warning to revocation of on-base driving privileges.

If membership in a car-pool drops below the minimum number of members, Air Force regulations require that the remaining members must replace the lost member. Under the reserved car-pool rules, each member has the responsibility to ensure that any status change in the car-pool is reported.

Failure to comply with the rules may cause loss of car-pool membership and base driving privileges for all pool members. False information to obtain the permits may result in discipline, including removal. Operation of a private car on the base is a conditional privilege which may be suspended or revoked for cause.

Management argued that revocation of the grievant's driving privileges was not a disciplinary action and the employer was not required to show just cause. Anyone applying for a reserved permit acknowledged that violation of rules or fraudulent use of the system might result in the loss of driving privileges for all car-pool members.

The agency said that although it granted clemency to the coworker, it was not obliged to show leniency to the grievant. It did not see how the grievant could be unaware of her husband's permit, since it was kept in the car in which she frequently rode.

Local 987, AFGE contended that the employer showed no evidence of wrongdoing by the grievant. Both she and her husband testified that she knew nothing of his parking permit. Clemency to the coworker but not the grievant was disparate treatment.

Issue: Did the employer have just cause for revoking the grievant's base driving privileges?

Award: Sustaining the grievance, Arbitrator Lloyd L. Byars ordered reinstatement of the grievant's privileges. It was not necessary for an action to be referred to as discipline in the contract for it to be, in fact, discipline. If such were the rule, management could arbitrarily take any detrimental action toward a worker as long as it was not listed in the agreement as discipline.

The grievant's loss of base driving privileges was clearly a penalty for what the agency deemed a shared liability for misconduct. It was, therefore, discipline, and could be upheld only if there were proof of wrongdoing.

Although the grievant's relationship to her guilty husband might suggest that she knew of the "A" permit, it did not in itself prove that she had knowledge. The fact that he kept the parking permit in a compartment in a car she frequently rode in did not convince the arbitrator that she was aware of her husband's abuse of the rules.

The agency's decision not to formally reprimand her indicated a lack of evidence that she was aware of her husband's abuse of the parking rules. The supervisory letter cancelling the proposed reprimand said, "Your testimony and verbal and written denial of any previous knowledge of an 'A' permit applied for by your husband...coupled with the lack of written verification of your knowledge of the 'A' sticker...lends credence to your basic position: lack of knowledge of your husband's proven wrongdoing dealing specifically with the 'A' permit."

When the husband got the "A" permit, only one car-pool member had to apply. Other members, including the grievant, did not then have to sign the application.

Arbitrator Byars ruled that it was unjust to hold someone responsible for knowledge of a permit for which she did not apply. The later rules for reserved parking permits had the effect of shifting the burden of proof from the agency to the employee.

Such joint liability would mean that the agency would only have to prove that the group was guilty, not each member. To require each member to prove innocence would violate a fundamental principle of labor arbitration. (*Warner Robins Air Logistics Center and Local 987, AFGE*, May 30, 1986, LAIRS No. 17430) ■

The Labor-Management forum

When Offering a Choice Is Unfair

The Air Force base which notified a nonappropriated fund employee that she could appeal a written reprimand through either the *agency* grievance procedure or the *negotiated* grievance procedure committed an unfair labor practice, the Federal Labor Relations Authority declares. Offering her a choice of appeal routes violated the exclusivity of the negotiated procedure.

The employer pointed out that nonappropriated fund employees have no statutory appeal procedures like those provided most federal employees. Consequently, management argued, the agency grievance procedure should be equated to the statutory adverse action appeal rights.

The law makes the negotiated procedure the exclusive procedure for resolving grievances within its coverage, with the exception of certain statutory appeal routes listed in 5 USC § 7121. The Authority found that the agency grievance procedure was not one of the exceptions. (*22 FLRA No. 59*, July 15, 1986) ■

Releasing Data to Union

The U.S. Army Corps of Engineers engaged in an unfair labor practice when it refused to give the union data on minority employment, the Federal Labor Relations Authority determines. The Authority ordered the agency to provide "sanitized" data with the information on nonbargaining unit members deleted.

Management contended that furnishing the data would violate the Privacy Act. FLRA said, as it has before, that it would balance the union's need for the data against the degree of intrusion on an individual's privacy.

The National Federation of Federal Employees maintained that it needed the information to pursue representational duties. The union would use it to see if the employer was complying with the agreement, to determine whether to file promotion grievances, and to prepare for bargaining.

In the Authority's judgment, the data would have limited circulation. FLRA added in a footnote that should the data in fact become widely known, it would take this experience into account in future similar cases. (*22 FLRA No. 74*, July 24, 1986) ■

Letters in Personnel Folders

The union proposal requiring the employer to place in the official personnel folders of affected employees a letter stating that they performed special work is negotiable, the Federal Labor Relations Authority holds. Accordingly, the Office of Personnel Management must bargain on Local 32, AFGE's bid. (*22 FLRA No. 61*, July 15, 1986) ■

Exclusive Representative Must Fairly Represent

Sustaining a complaint filed by a Library of Congress employee, the Federal Labor Relations Authority says that the union engaged in an unfair labor practice when it denied the employee continued legal representation in an adverse action proceeding because he had supported a rival labor organization.

The exclusive representative, the American Federation of State, County and Municipal Employees, had a past practice of representing bargaining unit members in adverse action proceedings at their request. Even though it was not legally bound to represent them in such proceedings, AFSCME's newsletter and bulletins advertised that it would do so.

AFSCME had begun handling the employee's appeal when it learned that he had signed the petition for another union seeking to unseat the incumbent. Then, after failing to persuade him to withdraw his signature from the petition, the union withdrew as his representative in the appeal.

The sole issue, FLRA said, was the denial of fair representation because of the employee's activities on behalf of a rival union. A dissident unit employee is entitled to the same representation from its exclusive representative as a loyal unit employee. (*22 FLRA No. 85, July 28, 1986*) ■

bookshelf

Dennis K. Reischl and Ralph R. Smith have co-authored a book designed to help managers and supervisors who are newly involved with labor relations. The writers tell how to recognize and deal with labor relations issues before they become problems.

The book explains the difference between a union and a bargaining unit, who is a supervisor or manager, third party decision makers, the role of past practices, and things to avoid in handling grievances.

Managing for Uncle Sam: The Supervisor's Handbook on Labor Relations in the Federal Government, 271 pp., paper back, can be purchased for $13.50 from WordSmith, Inc., P.O. Box 16021, Huntsville, AL 35802, telephone 205/535-4033. ■

The Unhappy Tale Continued from page 1

If, however, his petition was a motion to reopen his original appeal, MSPB refused it as well because he had withdrawn his initial appeal to file a grievance. He and the union should have known that the mere existence of his first appeal—even though withdrawn—could have led the arbitrator to determine that he had no jurisdiction.

The employee argued to the court that he was unlettered in the law, wanted to make sure he would get a hearing on the merits of his defense, and followed the route he was advised to take. He explained that he filed the MSPB appeal in order to assure an MSPB hearing in the event the union did not certify his case for arbitration.

The appellant contended that he did not know that if he later withdrew the MSPB appeal so he could proceed with arbitration, he would be barred from arbitration. He claimed that after the union certified his case, his non-lawyer representative advised him to withdraw the MSPB appeal.

The court noted that the removal letter warned the carrier that an MSPB appeal blocked him from using the grievance-arbitration procedure. He had the burden of finding out whether he could safely appeal to the Board and then withdraw that appeal without jeopardizing his arbitration rights. Although the union may have suggested that course, federal personnel are bound by the actions of their representatives.

"Though the MSPB cannot be faulted and we consider the result we reach to be correct," Judge Davis wrote, "that resolution is a nagging one...We think the employing agencies and the unions should advise employees, more precisely, of the dangers of appealing to the MSPB" when they might want to pursue arbitration. (*Duncan v. MSPB*, USCA Fed. Cir., App. No. 86-671, July 22, 1986) ■

Union Fairly Represented, OGC Rules

The American Federation of Government Employees did not violate its duty to fairly represent the employee, the Office of the General Counsel of the Federal Labor Relations Authority determines. According to the worker, the union ignored her complaints that management violated a flexitime agreement and it did not represent her fairly in a grievance.

AFGE had handled her grievance on a three-day suspension. Just as the grievance was about to go to arbitration, the union vice-president told her that AFGE would approve management's offer to reduce the penalty by a day. He felt the settlement was reasonable since her defense was based on mitigation rather than a denial of the charges.

The vice-president also referred to the costs of arbitration. He reminded her that AFGE had agreed to take to arbitration management's recent proposal to discharge her for alleged misconduct the previous month.

The OGC agreed with the regional director that the union's conduct in processing the grievance was consistent with the bargaining agreement. Also, AFGE's decision to settle rather than arbitrate was not, under the circumstances, arbitrary, capricious or in bad faith.

The law does not require unions to take all grievances to arbitration, the OGC said, and they have discretion in these matters. Since there was no evidence of unlawful considerations by AFGE regarding her grievance or flexitime concerns, the OGC upheld the regional director's decision not to issue an unfair labor practice complaint. (*Case No. 2-CO-60013*, June 9, 1986) ■

FLRA Orders Make Whole Remedy

The Federal Labor Relations Authority again refuses to review an arbitration award and orders an agency to obey the arbitrator's directive. While only courts—not FLRA—can determine the merits of these awards, the Authority may rule on noncompliance with the awards in unfair labor practice proceedings without consideration of the reasons for noncompliance.

The Bureau of Prisons had fired an employee at a New York correctional facility. The arbitrator reduced the penalty to a 60-day suspension and ordered the grievant's reinstatement to his regular job.

Instead of returning the worker to his New York post, the Bureau reassigned him to a Pennsylvania prison. When the American Federation of Government Employees asked the arbitrator to clarify his award, he said the grievant must be reinstated to his original NY job. The Bureau did not receive proper notice of the request for clarification, nor did the arbitrator give the agency a chance to respond.

The law requires an agency desiring review of an adverse action arbitration award to ask the Office of Personnel Management to seek reconsideration of the award. If OPM thinks the award violates law or regulation, it can seek reconsideration by the arbitrator and then court review, if necessary. Here, the Bureau did not request OPM to ask the arbitrator to reconsider the award so it could be appealed to the court. Instead, the employer refused to obey the award.

AFGE charged that the employer's refusal to comply with a final, binding award was an unfair labor practice. The Bureau argued unsuccessfully that the clarified award violated management's right to assign workers. Further, it was defective because the agency did not get proper notification or a chance to respond to the union's petition to the arbitrator.

FLRA found that under the statutory procedure the Bureau should have raised those issues with OPM, and it had not done so. The agency was guilty of an unfair labor practice.

As a remedy, the employer must reinstate the employee to his original job. After a few months on the Pennsylvania job, he quit because of hardships caused by the reassignment. But for management's noncompliance, FLRA held, he would not have resigned, and management must make him whole for pay and benefits missed since his resignation. (*22 FLRA No. 95*, July 30, 1986) ■

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U. S. GOVT. PUBS
DEPOSITORY 37

Attorney Fees Awarded to Union in Defense of ULP Complaint

The Federal Labor Relations Authority grants attorney fees to a union in the first case it decides under the Equal Access to Justice Act (EAJA). The law allows the prevailing party in certain actions brought by federal agencies to recover its legal costs from the government. A labor organization that successfully defends an unfair labor practice complaint issued by the FLRA's General Counsel may file a claim for its expenses under Part 2430 of the Authority's regulations.

In this case the General Counsel alleged that Local 495, American Federation of Government Employees, discriminated against one of its officers in violation of § 7116 (b)(4) by expelling her from membership because of her marital status. The union took this action after she assisted her husband in a campaign on behalf of a rival union.

The FLRA dismissed the complaint, finding that the union had not discriminated against the member by revoking her membership. After the Authority issued its decision, the union's attorney filed a claim for representation fees.

Reviewing the decision of the Administrative Law Judge on the AFGE's request for payment, the Authority set forth the standards under which legal costs may be awarded under the EAJA. The law allows expenses to be recovered by a prevailing party that meets specific eligibility requirements. The government may not be held liable for payment if the General Counsel can show that his position on the complaint was reasonable; that payment would be unjust because of special circumstances; or that the applicant unduly lengthened the case.

In agreement with the ALJ, the Authority found that the General Counsel's position was not reasonable. In order for the government to avoid liability, the General Counsel needed to present some evidence that the union removed the member because of her marriage to her husband. The General Counsel did not offer any proof on that point. In its defense of the complaint the union explained that it disciplined the official after she twice failed to provide information it had requested and refused to appear before a trial committee.

The FLRA concurred with the General Counsel that this case was novel because it was the first ULP complaint involving an allegation of discrimination based on marital status. However, the Authority rejected the contention that the alleged ULP was a special circumstance that would make an award of representation costs unjustified. The "special circumstances" provision of the law was intended to prevent the government from being penalized if it loses a case in which it had argued an untested legal theory in good faith. Here, the General Counsel simply failed to prove that the union engaged in prohibited discrimination.

The Authority did not find any indication that the AFGE had unreasonably delayed the proceedings. The amount of the award included the union's expenses associated with its application for fees. (*22 FLRA No. 98*, July 31, 1986) ■

NEW Developments...

Equal Access to Justice Act given first test by FLRA... 1

Employee removed for violating confidentiality of position... 1

Arbitration Roundtable
Was management liable for overtime pay to employees unable to leave workplace?... 2

Labor-Management FORUM
Authority requests advice on drug testing issues... 3

Bookshelf
"Outside the Chain of Command" No Defense Against ULP Charge... 4

Court Upholds DOL's Removal of Investigator

The federal employee's refusal to cancel his contract with a *Reader's Digest* subsidiary was cause for dismissal, the U.S. Court of Appeals for the Federal Circuit determines. The court affirmed the Merit Systems Protection Board ruling that the Department of Labor was justified in removing him.

The appellant and his partner worked for the DOL Inspector General. For four years they investigated labor racketeering at the Fulton Fish Market in New York City. At first working alone, they later enlisted the support of other federal agencies and the city police.

The investigation resulted in 48 indictments, 44 convictions, and an end to the racketeering. Commendations and awards from the press and Congress poured in on the two

(Continued on page 4)

PM 1.13:

ARBITRATION
roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

All Dressed Up and Nowhere to Go

Casefacts: A union president at a United States Coast Guard facility received notification from a general foreman that a planned public demonstration at an adjacent Immigration and Naturalization facility might interfere with the normal routine of the Center. The president was also advised that the demonstration might delay employees from leaving the facility because of traffic tie-ups.

The Federal complex which houses the Coast Guard and the INS facility has a large restricted parking lot behind the buildings. The lot itself has two entrances. The rear gate is locked, except for unusual circumstances, apparently because of heavy traffic on the street to which it enters.

The demonstration occurred as anticipated during midafternoon of a normally scheduled workday. At 3:25 p.m. the approximately 100 demonstrators spilled into the street, blocking off the normal flow of traffic. In response to a request by the police department, who handled crowd control during the demonstration, the Commanding Officer of the Base ordered the main gate closed. No employees whose normal workday ended at 3:30 p.m. were allowed to leave in cars.

The union president discussed this situation with the general foreman, who disavowed any knowledge of the situation, and then with the executive officer of the facility. The officer stated that employees would be allowed to leave the facility once he evaluated the situation. He also stated that no overtime would be paid to employees as a result of their delayed departure.

At approximately 3:45 p.m. a non-employee was allowed to drive out of the facility with a police escort. No violence was associated with the occurrence. Evidence was also submitted that employees were free to exit the facility on foot if they so pleased. By approximately 3:55 p.m. the rear gate was opened by the Support Center and all employees left in their vehicles without incident.

The union filed a grievance on behalf of the 35 employees prevented from leaving the parking lot. Overtime compensation was sought for the one half-hour employees were detained at the facility.

The union argued that the employees should be paid the overtime because management had the power to allow egress from the parking lot through either gate, as in the instance of the non-employee driver. By detaining only employees, the Agency acted in the role of an employer.

From the Employer's viewpoint the dispute was nonarbitrable. Even if the union were to win the arbitration, officials argued, the Comptroller General has a statutory obligation to review monetary arbitration awards if Federal officials question the appropriateness of the action. The CG, in this instance, could properly declare the payment of overtime to be illegal. In this situation the Portal-to-Portal Act, which covers reimbursement for time in transit while in a duty status, was not applicable. Finally, the agency asserted it had no control over the situation which developed outside the facility's gates, but closed the main gate at the request of police.

Issues: Does an arbitrator have jurisdiction when the CG has authority to review the arbitrator's award requiring the payment of overtime which is questioned by federal officials? Were the employees entitled to one-half hour of overtime pay while traveling from the parking lot to the main gate during the time in question?

Award: Arbitrator Joseph R. Rocha, Jr. ruled that the case before him was arbitrable. Despite its contentions, management was unable to support its argument that the Comptroller General can negate monetary awards of the arbitrator by declaring such payment unlawful. The arbitrator ruled that whatever authority the CG has in ruling on the legality of appropriated funds does not extend to expenditures ordered by arbitration awards. For this reason the allegation of nonarbitrability was without substance.

Turning to the merits of the case, Arbitrator Rocha denied the grievance made on behalf of the 35 employees detained in the parking lot. According to a Federal Personnel Manual Supplement, which interprets the Portal-to-Portal statute, there are two tests for determining whether time spent in preshift/postshift activity constitutes compensable hours of work. First, the activity must be considered work and must involve a substantial amount of effort and time, i.e., more than ten minutes per day. It is clear, the arbitrator asserted, that the time spent traveling from the activity to the exit is noncompensable in this instance. The normal traveling time for employees is five minutes. Under the test then, only the status of employees during the other 25 minutes needed to be determined.

The arbitrator relied on a decision of the Federal Labor Relations Council involving a similar matter. In *5 FLRC 182* [*FLRC No. 75A-98* (March 8, 1977), Report No. 122] the Council set forth two important criteria in determining whether overtime was compensable. Firstly, the agency must be responsible for the action which causes the employees to be delayed on the premises. Secondly, the period of detention must be significantly in excess of the normal exiting time from the premises.

In applying these criteria to the instant case, Arbitrator Rocha determined that the 30-minute waiting period for employees was significantly more than the normal exiting time. The arbitrator did not agree though, that the employer was responsible for the detention of employees. Management acted on a police request that no traffic be allowed to enter the street from either gate. Also, although vehicles were detained in the lot, employees were not prohibited from leaving the premisis by foot. For these reasons, management was not at fault. (*U.S. Coast Guard and Local R1-9*, July 2, 1986, LAIRS No. 17424) ■

The Labor-Management forum

Authority Seeks Comments on Negotiability of Drug Testing

The Federal Labor Relations Authority has requested interested parties to submit *amicus curiae* briefs on several cases where management has asserted the nonnegotiability of union proposals relating to agency initiated drug testing. These cases involve the substance of, procedures for, and/or appropriate arrangements concerning the implementation by agencies of changes to agency regulations describing their alcohol and drug abuse programs.

Subjects covered by the pending cases involve the frequency of testing, methods and procedures to be used, the safeguarding of information and the privacy interests of the employee. In deciding these cases the Authority must resolve which, if any, rights reserved to management under 5 U.S.C. 7106(a), are affected by the union proposals. To what extent are the union's proposals "procedures" or "appropriate arrangements" under 5 U.S.C. 7106(b)?

The cutoff date for the briefs is October 22, 1986. The Authority's announcement appeared in the *Federal Register* of August 22, 1986. ■

Senate Confirms Appointments

Last month the Senate confirmed **Daniel R. Levinson** as Chairman and **Mary F. Wieseman** as Special Counsel of the Merit Systems Protection Board and **Jean McKee** as Member of the Federal Labor Relations Authority.

Levinson, whose appointment will expire March 1, 1993, moves from the position of General Counsel for the Consumer Product Safety Commission to the top MSPB job. His prior experience includes serving as Deputy General Counsel at the Office of Personnel Management, partnership in a Washington law firm, and adjunct teaching at two university law schools.

Wieseman, formerly Inspector General at the Small Business Administration, will replace MSPB Acting Special Counsel Lynn R. Collins. Wieseman has been Inspector General for the Small Business Administration since 1983. She was previously Acting General Counsel for the Legal Services Corporation and partner in a Maryland law firm. The Special Counsel term runs for five years.

McKee has been Executive Director of the Federal Mediation and Conciliation Service, a post she assumed in 1983. She also served as Director of Government Relations for the General Mills Restaurant Group; member of the President's Advisory Commission on Public Diplomacy, and chief of staff for the New York State Assembly's minority leader. The FLRA appointment will expire July 1, 1989. ■

National Guard Violates Union's National Consultation Rights

The National Guard Bureau's unilateral change in working conditions without consulting with the National Association of Government Employees was an unfair labor practice, the Federal Labor Relations Authority rules. The Bureau implemented a policy allowing nonbargaining unit active Guard and Reserve personnel to fill bargaining unit jobs.

NAGE's national consultation rights entitle it to notification of substantive changes in conditions of employment before the changes go into effect. The union's status also gives it the right to reasonable time to present its views and recommendations to the Bureau. (*22 FLRA 90*, July 29, 1986) ■

Board Lacks Jurisdiction on NAF Appeal

Non-appropriated fund (NAF) employees cannot appeal to the Merit Systems Protection Board the employer's denial of a request for restoration to duty following a compensable, work-related injury. So finding, the Board rejected a NAF Air Force worker's petition for review of her case.

The Board has jurisdiction only if an appellant's case is appealable to it under law or regulation. NAF employees are not eligible for compensation for work injuries under 5 U.S.C. Chapter 81. Federal regulations establishing restoration to duty rights, including the right to appeal the denial of such rights to the Board, apply only to employees covered by Chapter 81.

Since NAF employees are not covered by Chapter 81, they are not "employees" for purposes of appealing to MSPB in restoration to duty cases. This Board decision reversed a presiding official's finding that NAF workers could file these appeals. (*Lewis v. Air Force*, MSPB Doc. No. PH03538610075, August 8, 1986) ■

bookshelf

The *Directory of Unions and Associations with Exclusive Recognition in the Federal Service* (July 1986) is a handy reference book of officers, phone numbers and addresses for unions and associations with Federal recognition. Assembled from information contained in the U.S. Office of Personnel Management's Labor Agreement Information Retrieval System, the publication lists all unions with exclusive recognition under 5 U.S.C. Chapter 71. Total number of employees covered by negotiated labor agreements is also included for each union. The 18-page document contains an easy reference for unions of the U.S. Postal Service and unions affiliated with the Public Employees Department (AFL-CIO) and the Metal Trades Department (AFL-CIO).

The publication may be purchased from the National Technical Information Service, Department of Commerce, Springfield, VA 22161, telephone (703) 487-4650, Order No. PB86234838. The price is $9.95 for a paper copy and $5.95 for a microfiche. ■

Military Maneuvers

In a case of first impression, the Federal Labor Relations Authority concludes that an organizational entity can commit an unfair labor practice by interfering with the bargaining relationship of another organizational entity in the same agency, but in a different chain of command.

The lengthy cast of characters included: the Department of Defense (DOD); Defense Logistics Agency (DLA), a primary national subdivision of DOD; Department of the Army (DOA), a primary national subdivision of DOD; Army Military District of Washington (MDW), a subordinate command within DOA; Cameron Station, an MDW activity which leased space to DLA; and Local 2449, American Federation of Government Employees. Only DLA had a bargaining relationship with the union.

The unfair labor practice complaint charged that DLA refused to bargain over the implementation of a paid parking program for DLA workers at Cameron Station. Further, the other agencies interfered with employees' protected rights and the DLA-AFGE bargaining relationship. In addition, DOA, MDW and Cameron Station interfered with the relationship by assessing the union for two parking spaces which the DOL-AFGE contract provided without cost to the union.

DLA claimed that since it was just a tenant, implementation was under MDW authority. DLA had twice asked Cameron Station to reconsider its decision to charge the union. The station sent DLA's requests to MDW which in turn sent it to DOA. The Army said the union had to pay.

The Authority determined that DLA should either have bargained or gotten DOD representatives to negotiate on its behalf with the union. DLA's failure to do so was an unfair labor practice.

Relying partly on private sector precedent, the Authority next considered whether DOD, DOA, MDW and Cameron Station acted unfairly in implementing the parking program. FLRA ruled that they did not interfere with employees' exercise of rights or refuse to bargain. They had no bargaining relationship with Local 2449 and could not violate a nonexistent duty.

The Authority noted that DLA did not ask DOD for assistance in resolving the matter and DOD did not refuse to assist. If DLA had asked and DOD refused, the Authority said, DOD's conduct would have been an unfair practice.

The Authority found that the Army and Cameron Station acted unfairly by making the union pay for two parking spaces. This interfered with the DLA-AFGE relationship. As a remedy, the Army and Cameron Station must reimburse the union for the parking fees.

MDW was not involved in the deliberative process, the Authority concluded. Consequently, it did not violate the law.

In FLRA's judgment, an agency should not be able to escape liability for conduct which unlawfully interfered with, restrained or coerced employees in the exercise of their rights "simply because it is not in the chain of command with the 'employer' at the level of exclusive recognition."

The Authority cautioned not to construe its decision as implying that agencies automatically run the risk of violating the law when they simply promulgate regulations governing the working conditions of unit employees. (*22 FLRA No. 93*, July 30, 1986) ■

Removal, (*Continued from page 1*)

investigators. Their employer welcomed the publicity, especially since the IG was a newly established unit.

In 1984 the *Digest* ran a long article on the case, and the appellant and his partner initially talked to the author on instructions from DOL. The appellant also signed a contract giving the magazine's subsidiary the exclusive option to buy the motion picture and television rights of his "verbal life story," including the investigation. The other investigator signed a similar contract.

The appellant represented in the contract that he was the story's sole owner and could grant rights to the company. He also agreed to provide technical assistance and to answer questions from the writers.

The IG subsequently directed all employees to get clearance if engaged, or planning to become engaged, in outside business. The appellant refused to obey the IG order to divest himself of the contract, although his partner did so. The agency fired him on charges of conflict of interest and refusal to obey an order.

He asserted that his supervisor had already given him informal clearance for the contract and the IG order was illegal. Further, the company had the facts of the investigation and only wanted details of his personal life and family.

The court accepted the Board's findings that the contract bound the employee not to tell the story to anyone other than the company, not excepting DOL. His agreement, for pay, to divulge details of his investigation activities was a conflict of interest.

The Federal Circuit noted that criminal investigative reports are excluded from coverage of the Freedom of Information Act. This confidentiality would be thwarted if investigators could sell the story of their investigations.

The court commented that DOL tried unsuccessfully to save the situation by providing a face-saving way out for the employee. And importantly, the employer and the Board applied MSPB's *Douglas* standards in deciding that dismissal, under the circumstances, was not too harsh a penalty. *Ferrone v. Department of Labor*, USCA, Fed. Cir. App. No. 86-696, July 28, 1986) ■

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Court Remands Official Time Decision

The U.S. Court of Appeals for the District of Columbia Circuit vacates and remands to the Federal Labor Relations Authority a decision on the negotiability of a union proposal for 100 percent official time. The American Federation of Government Employees appealed FLRA's finding that the provision, applicable to 12 union representatives, was negotiable only at the election of management. (See *Consultant*, August 16, 1985)

According to the Authority, the negotiability of official time under 5 U.S.C. 7131(d) of the statute was subordinate to management's reserved rights under section 7106(b)(1) in cases where the use of official time would interfere with management's reserved rights to allocate positions and employees to a work project or organizational entity.

The Authority found that the granting of full-time representation would necessitate the hiring of additional workers to fill the affected positions. Under the FLRA's "direct effects test" the negotiability of any union proposal which is "determinative of such numbers, types and grades, is negotiable [only] at the election of the agency" under section 7106(b)(1).

The court rejected the Authority's reasoning in this case. According to the court, the FLRA's application of the "direct effects test" under these circumstances, would effectively repeal section 7131(d). Since official time use necessarily reduces the amount of time an employee devotes to his job, management would always have a right to assert its section 7106(b) rights and refuse to negotiate despite the express terms of section 7131(d) to the contrary.

The court stated that any efficiently run agency will be required to hire more people if it provides additional official time to union representatives. FLRA's position would, in effect, penalize productive employees by denying them official time to be employee representatives. This potential prohibition of representational duties was clearly not the intent of Congress.

In providing for official time in the statute, Congress envisioned either some reallocation of positions or some additional hiring, the court reasoned. Hence, Congress therefore must have intended to place some limit on management's right to determine the number of employees assigned to a work project or organizational subdivision. Otherwise, the official time provision in section 7131(d) is meaningless.

The court cautioned that this ruling applied only to the negeotiability of the proposal and not the merits. It also asserted that it did not address the negotiability of an official time proposal which would require an agency to exceed Congressionally imposed limits on staffing in order to maintain the agency's present level of productivity.

Moreover, in this case the FLRA did not rely on, and the court did not address, the limits of 5 U.S.C.7117(a), which provides that the duty to bargain does not extend to matters inconsistent with federal law. The court left any question of potential conflict between sections 7117(a) and 7131(d) for the Authority to resolve. (*AFGE v. FLRA*, USCA DC, No. 85-1500, August 26, 1986) ■

NEW Developments...

Court remands case on 100 percent official time to Authority... 1

Board upholds removal of employee for violation of trust... 1

Arbitration Roundtable
Does union representative deserve reasonable time or fixed number of hours to prepare for arbitration?... 2

Labor-Management FORUM
Listing of agreement expirations occurring in July through December in major bargaining units... 3

Arbitrator's authority limited in performance appraisal disputes... 4

Authority says employee was improperly asked about union activities during interview... 4

"Conflict of Interest" Charge Upheld

The Merit Systems Protection Board upholds the removal of an employee for conflict of interest and falsification of documents. The case involved an employee who was charged with interfering in the competitive bidding process for a contract.

A construction firm, with which the appellant had a direct financial interest, was suspected of having inside information on a contract after it submitted a bid $24,000 less than the confidential estimate the government was using for the project. An investigation was initiated after substantial evidence was gathered that indicated the employee may have compromised the bidding procedure.

(Continued on page 4)

Pm 1.13:

ARBITRATION
roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

It Pays to Prepare

A union official at an Immigration and Naturalization Service facility requested 18 hours of official time to prepare a grievance for arbitration. Management, citing language in the negotiated grievance procedure, approved only two hours for preparation.

The American Federation of Government Employees grieved the two hour limit, contending that management unfairly restricted the union official and incorrectly interpreted the negotiated contract. Pertinent language in the grievance procedure states:

> "It is agreed that the employee and his representative will be given a reasonable amount of time to present the grievance. Upon request, a grievant and his Local representative may be authorized up to a maximum of 2 hours of official duty time to prepare a grievance for presentation."

The pertinent language of the official time section of the contract says that reasonable time will be given representatives of the union:

> "To be the personal representative of an employee who is presenting a complaint, grievance, or appeal from an adverse action."

The union contended that the literal interpretation of the contract means that two hours of official time is given to the union to prepare for the presentation of a grievance at Step I. The only time a grievance is presented, according to the contract, is at Step I of the grievance procedure. For all other steps, including arbitration, reasonable time should be allowed, as called for in the official time section.

Management argued that the agreement clearly states that the representative will be given two hours to prepare a grievance for representation. Furthermore, this provision applies to each step of the grievance procedure.

It was not true, as the union asserted, that a grievance is only presented at the first step of a grievance procedure. A grievance must be presented at every step of the procedure including arbitration, so the grievance procedure language should be the guiding language. If the parties had intended the union to receive "reasonable time" for this purpose, they would have included "preparation time" in the official time section of the contract.

The rift between the two parties over official time was not new. They arbitrated the same issue in 1979 under the same contract. In that decision, the arbitrator ruled that the agreement language specifically called for two hours of official time for grievance preparation and ruled this to include preparation for an arbitration. A witness for the agency was an agency advocate at the earlier arbitration hearing.

According to the testimony of this management witness in the current dispute, a union official at the prior arbitration hearing testified that the contract indeed limited the union to two hours to prepare for arbitration, with the understanding that council officers would be available to assist, and the union could request more time under the official time portion of the agreement. The union asserted that this testimony was unsubstantiated.

Issue: Is the union representative entitled to reasonable time as opposed to a maximum of two hours of official time to prepare a grievance for arbitration, under the provisions of the agreement?

Award: Arbitrator Howard V. Finston ruled that the grievant was entitled to a reasonable amount of official time to prepare a grievance for arbitration under the relevant provisions of the collective bargaining agreement. Citing case law, the arbitrator asserted that, in order to be properly understood, agreements, and particularly the agreement language in this dispute, must be considered in their entirety and not section by section. The true meaning of agreement language can only be understood in context with pertinent language throughout the contract.

In this case, the arbitrator was not swayed by either party's arguments. Nor did he find compelling either side's evidence in support of its position.

As for the previous arbitration decision in 1979, Arbitrator Finston, while taking the decision into account while making his determination, was under no legal obligation to accept the previous arbitrator's decision as controlling. Contrary to the previous arbitrator's ruling, Arbitrator Finston found the language of the grievance procedure unclear as to how much time a union representative should receive in preparation for arbitration.

The final decision, in this case, had to be based on the complementary nature of the grievance and official time sections of the contract. Certainly, it is "reasonable" to assume a two hour preparation limit is enough for union officials at the lower level of the grievance procedure. But a two hour limit is not a "reasonable" amount of time for union representatives to prepare a grievance for arbitration. Since the language of the contract is ambiguous on this point, the arbitrator ruled that reasonable time should be afforded the union representative to prepare the grievance for arbitration.

Arbitrator Finston ordered the grievant be given 12 hours official time, and that the agency adjust the grievant's annual leave balance accordingly. (*Local 1929, American Federation of Government Employees and Department of Justice, Immigration and Naturalization Service*, April 26, 1986, LAIRS No. 17328) ■

Federal Bargaining Calendar

July through December 1986

The Office of Personnel Management's Labor Agreement Information Retrieval System (LAIRS) has identified federal sector agreements which will expire during the last six months of this year. The contracts cover non-Postal bargaining units regulated by the Civil Service Reform Act of 1978.

The calendar below shows the expiration date of major agreements (those covering 1,000 or more workers) expiring in July through December, 1986. It includes the parties to the contract, the number of employees covered, and the type of agreement.

"Auto-open" refers to contracts with a fixed initial duration, after which no limit is placed on renewals or the length of renewal periods. "Auto-limited" describes automatic renewal agreements which limit either the number of renewals or the length of the renewal periods. Other agreements run for two or three years.

The data appears in *Labor Agreement Expirations in the Federal Service*, July 1, 1986—June 30, 1987. This report is available from the National Technical Information Service, Springfield, VA 22161.

	Parties	Employees Covered	Type of Agreement
JULY			
6	USA Armor Center & Ft. Knox, KY—AFGE/2302	2,245	Auto-open
29	Federal Law Enforcement Center, Glynco, GA—AFGE/2002	7,172	Auto-open
August			
	No major agreement expirations		
September			
1	Naval Ordnance Station, Louisville, KY—IAMAW/830	2,578	3 years
10	Defense Logistics Agency, HQ, Nation-wide, Alexandria, VA—DLA Council of AFGE Locals	29,334	Auto-limited
15	Dover Air Force Base, DE—AFGE/1709	1,047	3 years
15	Panama Canal Commission—Maritime/Metal Trades Council	7,264	Auto-limited
18	DOC, Bureau of the Census, Jeffersonville, IN—NFFE/1438	1,713	Auto-open
30	USDA, National Forest Service, Washington, DC—NFFE Forest Service Council	15,300	Auto-limited
30	DMA, Hydrographic/Topographic Center, Brookmont, MD—AFGE/3407	2,467	2 years
October			
11	NASA Goddard Space Flight Center, Greenbelt, MD—IFPTE/29	1,163	Auto-open
14	Eglin Air Force Base, FL—AFGE/1897	2,736	Auto-open
20	USAF, Chanute Technical Training Center, IL— NFFE/493	1,008	Auto-limited
20	U.S. Immigration & Naturalization Service, Washington, DC-National Immigration & Naturalization Service Council, AFGE	6,105	Auto-open
November			
6	Housing & Urban Development, HQ, Washington, DC—AFGE	8,020	Auto-limited
9	USN, Public Works Center, Guam—AFGE/1689	1,083	3 years
25	Department of Energy, HQ, Washington, DC—NTEU	2,778	Auto-limited
December			
11	USA, Ft. Lewis, WA—AFGE/1504	1,032	3 years
13	U.S. Customs Service, HQ, Washington, DC—NTEU	11,808	Auto-open
22	USA, White Sands Missile Range, NM—NFFE/2049	1,675	Auto-limited

(Continued from page 1)

As part of the investigation, the appellant was required to fill out a financial disclosure form. On the form the employee listed no non-federal affiliations or financial interests and did not list real property subject to disclosure requirements.

The investigation revealed that the employee loaned a substantial amount of money to the contractor and had several informal contacts with him. Investigators also learned that the employee sought to have a bonding company endorse the construction firm's bid on the project.

The appellant argued that he only had a superficial interest in the construction firm and that he did not provide inside information to the firm for its bid. He asserted that his only involvement with the contract was in reviewing the proposed layout plans.

The Board rejected the appellant's arguments. The employee clearly acted as an agent for the bidding firm when he requested the bonding company to endorse its offer.

The employee also knowingly supplied false information on the disclosure form. Although the presiding official did not rule on the falsification charge, the Board rejected the employee's assertion that he was improperly required to complete the disclosure form by not being informed of his Fifth Amendment rights. MSPB ruled that the agency was not required to inform the appellant of his rights since he was not being formally interrogated at the time.

Using the *Douglas* factors the Board ruled that the employee's violation of trust was serious enough to uphold his removal from the service. (*Connett v. Navy*, MSPB Doc. No. SF07528510912, August 8, 1986) ■

Question...able Behavior

The Federal Labor Relations Authority, reversing a decision of its Administrative Law Judge, rules that an employee was unfairly coerced during an interview. The issue was part of a consolidated case brought before the FLRA on exception by the Authority's General Counsel. The employee was interviewed for a job vacancy at a Veterans Administration hospital. During the interview, the applicant was questioned concerning his role as a union officer. He was asked about how much time he spent on union activities and what he would do if his duties as an employee and as a steward conflicted.

The Administrative Law Judge ruled that the questioning was permissible, since it was important that potential conflicts be resolved in the most accomodating way possible. The judge concluded that the questions were legitimate concerns of the agency in filling the vacancy.

The Authority disagreed with the judge's ruling and accepted the General Counsel's argument that management's questions suggested a relationship between the employee's union duties and his possible selection for the vacancy. Such actions constitute interrogation and violate section 7116(a)(1) of the Statute.

FLRA said that the context of the questioning established a connection between the protected activity and the selection process. The Authority accordingly reversed the presiding official's decision and found management guilty of an unfair labor practice. (*23 FLRA No. 14*, August 14, 1986) ■

Arbitrator's Authority in Appraisal Disputes Outlined

The Federal Labor Relations Authority rules that an arbitrator exceeded his authority in directing management to re-evaluate an employee's performance appraisal and issue an appraisal of fully satisfactory or better.

In the case, appealed by the Veterans Administration, the Authority cited a number of recent decisions which outline the role of an arbitrator in resolving performance appraisal disputes. According to the FLRA, an arbitrator:

- may resolve an employee's grievance claim when adversely affected in his/her performance appraisal by management's application of the established performance standards.
- may sustain the grievance on finding that management applied the standards in violation of law, regulation, or an appropriate provision of the parties' collective bargaining agreement.
- may, in sustaining a grievance, order that the grievant's work product be properly evaluated by management.

The FLRA, though, has cautioned arbitrators not to substitute their judgement for that of management as to what the rating should be. Here, although the arbitrator correctly found that the employee was denied a fair evaluation, he improperly ordered the employee be rated no less than fully satisfactory. The award was modified to eliminate references to minimum ratings in the re-appraisal. (*22 FLRA No. 103*, July 31, 1986) ■

Sign Language

The Federal Labor Relations Authority has struck down a union proposal to place a sign at the entrance to a Army installation. The sign would welcome people to the installation courtesy of the union.

The union maintained that the sign was a form of communication with its members through the use of agency facilities. Management maintained that the proposed sign was nonnegotiable since the matter did not affect the working conditions of bargaining unit members.

The Authority ruled that the proposal was not a condition of employment. FLRA saw no apparent correlation between the hanging of the sign and union communication with its members. (*23 FLRA No. 8*, August 11, 1986) ■

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Court Throws Out FLRA Ruling on Fair Representation

OCT 24 1986

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In an important decision for labor, the District of Columbia Appeals Court limits the ways in which federal unions with exclusive recognition must provide equal representation to union and non-union members included in the bargaining unit.

The court held that the National Treasury Employees Union did not commit an unfair labor practice by refusing to give legal help to a non-member employee who was appealing his removal to the Merit Systems Protection Board. The court distinguished between the union's duty to represent members and non-members equally in a grievance, as compared to representing them in a statutory appeals procedure.

In an earlier decision, this same court had ruled that NTEU unfairly refused to provide representation by attorneys to non-member workers in grievances arising under the negotiated grievance procedure. There the court said that the legal representation applied directly to enforcement of "the fruits of collective bargaining."

In the present case, however, the court found that appeals to MSPB did not pertain to the fruits of collective bargaining. The attorney representation sought by the non-NTEU member pertained to a statutory procedure to challenge his removal and not to a grievance or other procedure growing out of a collective bargaining agreement.

Since NTEU had a practice of providing attorneys to represent only members in MSPB appeals, it refused to give legal assistance to the non-member at the Bureau of Alcohol, Tobacco and Firearms. BATF brought unfair labor practice charges against the union, and the Federal Labor Relations Authority found NTEU guilty of the charges.

On appeal, the D.C. Circuit concluded that the Authority imposed a broader duty of fair representation on federal sector unions than the courts have imposed on private sector unions under the National Labor Relations Act. Congress, by enacting the Federal Service Labor-Management Relations Statute in 1978, intended no more than to extend private sector practice to the federal sector. In the private sector, the duty of fair representation is co-extensive with the powers belonging to the union as exclusive representative of bargaining unit members.

In the federal sector, exclusive representative powers do not include representing employees before MSPB. Therefore, the court held, the private sector obligation imposed on unions to fairly represent employees did not apply to federal employees in appeals before the Board.

The D.C. Circuit overturned the Authority's finding that the union acted unfairly. The court decision apparently applies to other statutory appeals procedures such as those of the Equal Employment Opportunity Commission. (*National Treasury Employees Union v. Federal Labor Relations Authority*, USCA D.C. Cir., No. 85-1053, September 2, 1986) ■

NEWS Developments . . .

Appeals court limits union's duty to fairly represent . . . **1**

Special panel upholds removal of handicapped employees . . .

Arbitration Roundtable

Arsenal workers grieve mandatory use of annual leave . . . **2**

Labor-Management FORUM

FLRA issues new and proposed rules . . . **3**

Board mitigates penalty . . .

Court suit against union for failure to represent . . . **4**

Authority modifies arbitration award on contracting-out . . .

Special Panel Issues Second Ruling in Mixed Cases

Concluding that an agency's duty to reasonably accommodate a handicapped worker is not unlimited, the Special Panel rules that the Merit Systems Protection Board correctly upheld the firing of a physically handicapped employee on charges of poor performance and leave violations.

"An agency is not required to spend its money and exert its resources pursuing every conceivable accommodation advanced by an employee where there is little or no likelihood that the accommodation will correct the performance or conduct deficiencies claimed to be caused by the handicap," the Panel observed.

The appellant's employer, the Department of Education, provided him with liberal leave, fewer assignments, opportunities for training, and closer supervison. DOE considered reassignment but could find no suitable job for him.

(*Continued on Page 4*)

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ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Forced Vacations at Arsenal?

Casefacts: In January 1986 the Pine Bluff, Arkansas Arsenal posted a bulletin stating that the installation would be shut down for four days that year. Each shutdown was in connection with a scheduled holiday such as the Friday following Thanksgiving.

The bulletin was Local 953, American Federation of Government Employees' first notice of the shutdown. The union insisted that management had no unilateral right to force bargaining unit members to take their annual leave on any given day.

The contract calls annual leave an "earned right." The Federal Personnel Manual describes it as time for rest, emergencies, etc, adding that the taking of it is an absolute employee right.

AFGE argued that for over 10 years it was past practice not to use forced annual leave. Selection of leave days was left almost entirely to employees' discretion, unless agency work needs required their presence on certain days. This was true even during slower periods around holiday seasons. Management had always found work for those who did not want to use annual leave during holiday intervals.

The union noted that Arsenal rules allow employees to accumulate 30 days of annual leave. Workers liked to store up this 30 days as insurance against layoffs and reductions-in-force, or to receive it at retirement.

Forcing all employees to take off the disputed four days, AFGE argued, hampered their chance to accumulate 30 days, especially newer workers who got only 13 annual leave days. If managment imposed four of the 13 days, newer employees had only nine discretionary leave days. It was possible that some workers might reach the holiday season with no accumulated leave and have to take unpaid leave. This would be burdensome and unfair.

Lastly, AFGE asserted that the employer did not show by factual data that closing the Arsenal for four days meant a substantial cost savings and increased efficiency. Management merely "presumed" that there would be some savings. There was no evidence of lack of funds or shortage of work.

The employer contended that the contract says all matters covered by it are governed by law and government-wide regulations, including the FPM. The law gives management the right to declare when leaves can be taken, based on agency needs.

While the FPM says annual leave is to be used for rest, etc., it also says leaves may be used to fulfill agency needs. The FPM specifically provides that while taking annual leave is an employee right, this right is subject to the right of the agency head to fix the time of the leave. The Army's Civilian Personnel Manual contains a similar provision.

Moreover, Army rules authorize commanders to close an activity when necessary for planned managerial reasons and to require workers to take annual leave or leave-without-pay. Annual leave can be imposed without employees' consent if they get at least 24 hours' notice. The Arsenal bulletin gave notice of the shutdown nearly a year ahead of time.

So many people are absent during holidays that it was inefficient to keep a handful of employees on make-work like cutting the grass. The Arsenal had not escaped the budget-cutting measures now prevalent in the federal sector. It did not take a study to show that it was an unnecessary cost to keep only a few people on the job.

In summary, the employer argued that numerous policies and regulations grant management the right to close a facility for economic and efficiency reasons, and to force employees to take annual leave days. This was a nonnegotiable right, and management did not exercise it capriciously.

Issue: Did the Arsenal commander have authority to close the installation and require employees scheduled to work to take annual leave?

Award: Dr. A. Dale Allen, Jr., the arbitrator, denied the grievance.

He cited *How Arbitration Works*. Authors Elkouri and Elkouri state that management's right to schedule vacations during temporary shutdowns is normally permitted by arbitrators unless compelling contract language requires due consideration of employee wishes. Further, if management has a clear contractual privilege to schedule vacations, especially when efficiency and economy are major considerations, employee wishes cannot hamper this right.

The Federal Labor Relations Authority, in *18 FLRA 38*, found that the decision to shut down or curtail operations was an aspect of management's right to lay off.

The arbitrator said the authorities submitted into evidence gave management the right to shut down a facility and to schedule workers for annual leave during the closure. This might not be attractive to affected employees, but that was the way the language read. Of course, the commander must be reasonable in his assessment of the need for economy and efficiency.

Arbitrator Allen held that the commander's decision to close the facility on the disputed four days was economically sound and reasonable. His decision made economic sense. Perhaps next year four such days would not be required because the holiday schedule would fall on different week days.

The past practice argument was irrelevant because the language of the written authorities so clearly favored management's prerogative. In arbitration decision-making, past practice does not usually overrule specific contract provisions except for unusual circumstances not present here. (Pine Bluff Arsenal and Local 953, AFGE, August 12, 1986, LAIRS No. 17468) ■

The Labor-Management forum

FLRA Issues Final and Proposed Rules

In the *Federal Register* of September 23, the Federal Labor Relations Authority issued final rules on transition, privacy, and attorney fee awards. In the same *Register* the Authority also included proposed rules covering other subjects.

The final rules become effective on October 23. One set of the new rules deletes Part 2400 governing transitional cases filed before the Authority began full operations in early 1979. Another set provides for annual notice of FLRA's record systems under Part 2412.3. The third set makes certain changes in Part 2430, Awards of Attorney Fees and Other Expenses, pursuant to recent amendments in the Equal Access to Justice Act.

The proposed rules would make major revisions in present FLRA regulations. They include:

- —changes in the computation of time for filing papers with FLRA, General Counsel of FLRA, Regional Directors, or an administrative law judge.
- —a requirement that parties in an unfair labor practice proceeding exchange lists of certain witnesses and copies of documentary evidence.
- —further delegation of FLRA's decision-making authority in unfair labor practice cases to its administrative law judges.
- —a requirement that federal agencies include in their written assertions of nonnegotiability the specific reasons for making such assertions, including relevant citations.
- —a requirement that unions, in petitioning for review of negotiability issues, include specific arguments on the negotiability of the disputed proposals with relevant citations.
- —a determination that a party filing timely exceptions to an arbitration award need not also file a request for a stay of the award.

The Authority says that its proposed rules should expedite case processing. Interested parties have until October 23 to comment on the proposals. ■

Board Mitigates Penalty

The Merit Systems Protection Board, sustaining the initial decision of its administrative judge (AJ), orders the Defense Logistics Agency to change a computer operator's dismissal to a 90-day suspension.

The computer operator had falsely notified DLA that he did not receive two paychecks. Duplicate checks totaling less than $100 were issued, and he cashed all four paychecks. He pled guilty to conversion of government property to personal use and was sentenced and put on probation for a year.

The AJ sustained the embezzlement charge but concluded that the removal penalty was unreasonably severe given the unique factors of the case. The appellant's low-level GS-3 job did not involve access to negotiable checks. Despite DLA's contention that his position was one of trust and sensitivity, the agency let him perform the same duties for five months following his admission of theft, thus demonstrating its continuing trust in him.

Other reasons for mitigation included the employee's satisfactory 11-year work record. DLA's deciding official determined that the appellant's potential for rehabilitation was good. The employer's table of penalties provided a range of reprimand to removal for a first offense of theft. Further, there was some evidence of disparate penalties in similar cases.

The employer challenged the AJ's decision, but the full Board decided that management arguments constituted mere disagreement with the AJ's conclusions. Since the arguments failed to meet MSPB standards for review, the Board affirmed the mitigated penalty. (*Goode v. DLA*, MSPB Doc. No. PHO7528610067, Aug. 15, 1986) ■

Excessive Interference

Three Local 3186, AFGE proposals are nonnegotiable, the Federal Labor Relations Authority says, because two would "excessively interfere" with management rights and the third conflicted with Office of Personnel Management rules.

The proposals responded to the Social Security Administration's reduction-in-force of temporary workers and a new restriction that permanent part-time employees work within established duty tours. The proposal requiring a reduced workload and another requiring recall based on seniority interferes with management's right to assign work, hire, and select. The recall bid also clashes with an OPM rule that agencies select from any appropriate source.

The third proposal would convert part-timers, upon request, to permanent full-time positions. Since this applies only when SSA decides to fill vacant full-time jobs, it does not excessively interfere with management's right to determine the number of employees and make selections. However, the proposal is not bargainable because it prevents SSA from selecting from any appropriate source. (*23 FLRA No. 30*, August 15, 1986) ■

Correction

The *Consultant* of August 15, 1986, incorrectly stated on page one that the Supreme Court had upheld the arbitrability of contracting-out grievances. The fact is that the Supreme Court has not reviewed this issue which earlier had been addressed by the D.C. Circuit Court of Appeals. ■

Limitations on Arbitral Authority in Contracting-Out Awards

If management's contracting-out actions violate the agreement, an arbitrator may only issue a cease and desist order, the Federal Labor Relations Authority says. The arbitrator, when interpreting a contract provision, cannot order cancellation of the procurement order or direct management to reconstruct its decision. So finding, FLRA deleted from an arbitration award an order that the Army Communications Command Agency cancel its procurement action.

The Authority's decision expanded further its *22 FLRA No. 72* ruling on arbitral remedies where agencies fail to comply with contracting-out laws and regulations. In that case FLRA held that although arbitrators cannot order cancellation of an agency's action, they can order management to reconstruct its decision. (*23 FLRA No. 22*, August 15, 1986) ■

Federal Workers Can Sue Union for Failure to Fairly Represent

The Tenth Circuit Court of Appeals, breaking new ground, rules that a discharged federal employee may sue a union in court for breach of the duty of fair representation. The decision overturned a lower court determination that the worker's sole remedy was to file unfair labor practice charges with the Federal Labor Relations Authority.

The Tenth Circuit held that a union representing federal employees is under the same constraints as one representing private employees. Nothing in the Civil Service Reform Act of 1978 or its legislative history showed that Congress intended the right of federal workers to sue unions for failure to fairly represent to be different from the right of private sector workers.

The case concerned a supply clerk fired by Tinker Air Force Base. She conferred with Local 916, American Federation of Government Employees and decided to appeal management's action to the Merit Systems Protection Board. Because the union did not file her appeal until the filing deadline had passed, the Board dismissed her plea. Then, instead of bringing to the Authority a charge that AFGE failed to fairly represent her, she brought suit in district court.

The lower court accepted union arguments that the Authority had exclusive jurisdiction over her complaint. The Tenth Circuit, however, found that AFGE's contention was not supported by statute or regulations. (*Pham v. American Federation of Government Employees*, USCA 10th Cir., No. 85-1263, August 26, 1986) ■

Agency Unable to Accommodate Handicap Through Reassignment

A carpenter's need for a job in a totally fume and dust free environment was not one which an industrial facility such as the Tobyhanna Army Depot could reasonably accommodate, the Merit Systems Protection Board determines. Accordingly, the Depot was not guilty of handicap discrimination and was justified in removing him.

The employee had severe allergies barring exposure to contact cement, fumes and dust. Although management removed him from the main carpentry shop and assigned him to carpentry jobs in other buildings and outdoors, he still complained of symptoms from exposure.

The agency provided him with a respirator, but he had symptoms even when using it. Management thought of reassigning him to electrician helper and sheetmetal worker positions, but these would also expose him to fumes.

The Board considered whether the employer should have accommodated the appellant's handicapping condition by creating a dust and fume free environment. MSPB determined that such an accommodation would be unreasonable and impose an undue hardship on the agency's operations. (*Rosiak v. Army*, MSPB Doc. No. PHO7528510755, July 1, 1986) ■

Special Panel, (*Continued from Page 1*)

The Special Panel found that the employer met its obligations to the appellant, an epileptic, under the Rehabilitation Act. It further found that the Board had determined that the employer proved its charges by the required standard of evidence. When the appellant's performance failed to improve after steps taken by his employer, the agency was justified in firing him.

The Special Panel deals with "mixed cases" where employees allege both discrimination and prohibited personnel practices. When the Merit Systems Protection Board and the Equal Employment Opportunity Commission—the agencies which handle claims of discrimination and prohibited practices—issue conflicting decisions, the Panel resolves the disagreements. This is the Panel's second ruling.

In this case two Panel members wrote the majority opinion: Barbara J. Mahone, Panel Chairman, and Maria Johnson of the MSPB. The third Panel member, Fred W. Alvarez, EEOC Commissioner, dissented. In Alvarez' opinion, procedural errors of the EEOC, MSPB and the Special Panel combined to deprive the appellant of meaningful review of his discrimination claims by EEOC. (*Lynch v. Dept. of Ed.*, Special Panel No. 2, Aug. 20, 1986) ■

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Prerequisite for Initiating a Performance-based Action

If an agency substantially changes an employee's performance standards, it must let him perform under the revised standards before determining that his work is unacceptable and initiating an action to remove or demote him for poor performance. So finding, the Merit Systems Protection Board ordered the Air Force to cancel the appellant's removal.

The employee was earlier notified of unacceptable performance in one critical element and given 30 days to improve. Then he got a new supervisor who developed a new set of elements and standards for the appellant.

The revised plan added a new critical element and three noncritical elements. It eliminated the critical element that the employee allegedly failed to meet by the end of his first "opportunity period" and substantially altered most of the remaining standards.

Management simultaneously informed the appellant of the new plan *and* that his performance was unacceptable under the old standard during the opportunity period. At the same time, the agency told him he had an additional 30 days to bring his work up to an acceptable level. It fired him at the end of the new 30-day period for failure to meet a critical element of his new plan.

The Board found material differences between the original and revised performance plans. MSPB also found that the appellant did not have a chance to perform under the new standards and be appraised before being put on an opportunity period and given a chance to show acceptable performance.

Accordingly, management did not meet the requirement that unacceptable performance must be determined before placing a worker on an opportunity period. The Board told the employer to retroactively reinstate the appellant. (*Boggess v. Air Force*, MSPB Doc. No. DAO4328610089, August 19, 1986) ■

Use of Agency Grievance Procedure by Unit Members

In a case of first impression, the Federal Labor Relations Authority rules that the Navy engaged in an unfair labor practice by denying a bargaining unit employee access to the agency grievance procedure on a matter not covered by the negotiated grievance procedure. The employee wanted to grieve his promotion rating for a non-unit vacancy.

The Portsmouth Naval Shipyard argued that OPM regulations grant an agency discretion in deciding whether to extend coverage of its administrative grievance procedure to unit employees, and that Navy rules deny such access. The International Federation of Professional and Technical Engineers contended that this caused a no man's land where unit employees would have no avenue to grieve merit promotion actions on positions outside the unit.

The statute, with certain exceptions, makes the negotiated grievance procedure the exclusive procedure for resolving grievances within its coverage. The law does not mandate the scope of an administrative procedure.

In the Authority's opinion, the law does not prohibit unit employees from using the agency grievance procedure to raise issues outside the scope of the negotiated procedure. Once an agency establishes an administrative procedure, it becomes a condition of employment.

FLRA held that an employer cannot bar unit members from using the agency procedure for matters not covered by the negotiated procedure solely because of their unit-member status. The Navy's exclusion was discriminatory because it interfered with employees' exercise of collective bargaining rights.

The Navy is considering whether to seek court review of the Authority's decision. (*23 FLRA No. 68*, Sept. 29, 1986) ■

NEW Developments...

Worker has right to perform under new standards before opportunity period... 1

Shipyard must let unit members use agency grievance procedure, FLRA says... 1

Arbitration Roundtable
Was grievant AWOL or did she follow leave procedures under past practice?... 2

Labor-Management FORUM
Panel rejects management proposal to conduct negotiations by telephone... 3

Bookshelf

Enforced leave found to be discipline requiring adherence to adverse action procedures... 4

Authority "respectfully disagrees" with court decisions on dues recoupment... 4

Pam 1.13:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Do-It-Yourself Leave Approval

Casefacts: The grievant had worked in the Hydraulics Unit of the Air Logistics Command at the McClellan Air Force Base, California, for 11 years. For the past two years she worked on the swing shift.

In 1985 she planned to take several days of leave. On March 4, she marked the supervisor's attendance log in which her name was listed with an "A" for March 5, 6, 7 and 8 to indicate that she would be on annual leave on those four future days.

The day shift supervisor noticed the grievant's entry in the attendance log on March 5 but thought the swing shift supervisor had made the notation. When he discovered that the grievant made the entry herself, he listed her as absent without leave for those four days. On March 12, after she returned to work, he counseled her concerning what he viewed as her unauthorized absence.

According to the grievant, when she marked the log she followed a past practice of recording the fact that she planned to take annual leave. Local 1857, American Federation of Government Employees maintained that this practice existed on the swing shift for at least two years.

Four swing shift employees in Hydraulics and another work unit testified that it was a permissible practice to record annual leave by making a notation in the attendance logs. If the employee did not receive a word of disapproval, it was assumed that the leave was granted.

Both the day shift supervisor and the swing shift supervisor were appointed to their present positions about two months before the incident causing the grievance. The swing shift supervisor's responsibilities involved roving about the building to oversee different units located there.

The swing shift supervisor was formerly a day shift supervisor. He testified that when on the day shift he was not aware of any past practice whereby swing shift workers entered leave plans in the log.

The day shift supervisor testified that he, too, was unaware of any such past practice. He said workers could request leave by speaking to a supervisor, a telephone call, or leaving a note for the supervisor. The supervisor would then inform the employee if the leave was approved.

The day shift supervisor acknowledged that when the grievance was processed prior to arbitration, he did not question employees or seek information concerning the possible existence of a past practice. After the incident, the attendance log was locked up and made unavailable to employees.

Management argued that since the bargaining agreement requires employees to get express supervisory permission before taking leave, marking leave in the log was inappropriate. Consequently, when the supervisor changed the grievant's entry to AWOL and counseled her about what he considered an improper procedure, he was reasonably requiring her adherence to contractual procedures.

Issues: Was the grievant's act of marking herself absent in the attendance log book a proper method to obtain permission to be absent? Should her absence be excused?

Award: Arbitrator Herman M. Levy sustained the grievance. He ordered the agency to change the grievant's attendance record to show that she was on annual leave for four days and to remove any record of counseling from the files.

After considering the record, the arbitrator concluded that a past practice existed on the swing shift permitting employees to make leave entries in the log and to assume that these leaves were permissible when the supervisor did not disapprove. The grievant's recording of her leave was therefore a proper method to be used.

The contract language supported management's contention that approval by a supervisor was prerequisite to obtaining leave. No contract provision gave employees a right to make leave entries in the log. Obviously, Arbitrator Levy commented, it was more efficient and orderly for leaves to be granted only after express supervisory permission. Allowing workers to make their own entries could reduce managerial control over the leave system.

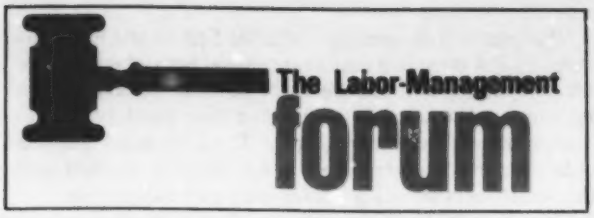
The past practice existed—apparently without any adverse actions coming to the supervisor's attention—so that there was no basis for the supervisor to disapprove the practice. However, when the new supervisor became aware of the practice, he believed it contrary to agency policy and terminated it.

The development of the practice was understandable since the roving swing shift supervisor was responsible for a number of units in the building. He was not always readily available for a face-to-face leave request. The grievant's action was not an isolated instance in one unit since employees in other units made similar entries over a two-year period. The fact that the new day shift supervisor just discovered the practice did not mean that the practice never existed.

Under the circumstances, the supervisor's actions toward the grievant were unfair. Although no financial penalty or discipline were involved, the grievant was made to appear an employee who did not abide by the leave policy and who needed counseling on her improper behavior.

This treatment toward a long-time worker might well embarrass her with respect to co-workers and wound her pride when she knew that she had done nothing improper. She had the right to be vindicated and told that the supervisor erred.

Perhaps, the arbitrator added, had the supervisor investigated the situation before taking action, and announced that the practice was discontinued without taking action against the grievant, this entire arbitration proceding could have been avoided. (*Local 1857, AFGE and Air Logistics Command*, May 5, 1986, LAIRS No. 17442) ■



Value of Hearsay Evidence Depends on Circumstances, Court Says

Hearsay evidence is sufficient to sustain the dismissal of an employee who presented in defense only an unsworn denial of the charges against him, the U.S. Federal Circuit Appeals Court rules. The case concerned a U.S. Postal Service worker fired on charges of allegedly selling cocaine.

The employee argued that hearsay evidence did not meet the preponderance of evidence standard. The court noted that his appeal to the Merit Systems Protection Board expressly waived his right to a hearing. This prevented the employer from presenting live testimony which the employee could have attempted to rebut. "He cannot have it both ways," the Federal Circuit said. He cannot waive hearing rights and then complain that the evidence was only hearsay.

The employee next asserted that his removal was not for the efficiency of the service. The court, however, found that management showed a rational basis for its conclusion that the discharge would promote efficiency. In so doing, the court cited judicial case law upholding terminations based on the sale of illegal drugs.

"A presumption of good faith attends agency actions," the court held. "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."

The employee further asserted that the seven months' delay between the day he sold the cocaine and his removal was a harmful procedural error invalidating his removal. He also charged entrapment.

The lapse of time was a weakness in the government's case, the court said. Without more evidence, however, the time lag did not prove entrapment, disprove the Merit Systems Protection Board decision that removal for this egregious conduct was appropriate, or result in harmful procedural error.

The Federal Circuit dismissed the employee's appeal, thus upholding the Board decision that the agency's removal action was reasonable. (*Sanders v. U.S. Postal Service*, USCA Fed. Cir., App. No. 85-2722, Sept. 22, 1986) ■

Hello, Operator?

Rejecting the Consumer Product Safety Commission's proposal to conduct negotiations by telephone, the Federal Service Impasses Panel directs the agency and Local 3519, AFGE to meet at the bargaining table, as proposed by the union. The Panel said that face-to-face bargaining should enhance negotiations.

CPSC argued that bargaining over only two issues would likely be brief. Since the chief management negotiator was stationed in Washington, D.C., telephoning would save the cost of his travel to Dallas to bargain with the small, 10-person unit. During previous negotiations the union itself requested a conference call hookup for its officials who might be on road trips when a meeting was held.

The Panel noted that the law requires parties to meet at reasonable times and convenient places as frequently as needed. Further, the employer did not show that it lacked the travel funds necessary to finance face-to-face negotiations. Also, using speaker phones might impede bargaining and prevent the parties from exchanging documentary evidence. FSIP's order ended the bargaining impasse. (*Case No. 86 FSIP 91*, August 15,.1986) ■

When Does Election of Forum for Appeal Take Place?

The Federal Labor Relations Authority upholds an arbitrator's finding that the grievant was not barred from grieving a suspension merely because he earlier consulted with an Equal Employment Opportunity counselor.

The Authority ruled that an employee, faced with a choice of using either the negotiated grievance procedure or the statutory EEO appeals procedure, makes his election when he files a formal grievance or files a formal written complaint. The employee does not elect the statutory procedure simply by using the precomplaint process.

In this case an employee of the U.S. Marshals Service consulted with an EEO counselor about his proposed suspension. Three months later the employee filed a grievance protesting that the suspension was not for just cause. Management lost its contention that the worker's contact with the counselor barred him from grieving. (*23 FLRA No. 60*, September 25, 1986) ■

The second edition of Sam Kagel's *Anatomy of a Labor Arbitration* is now available. This is not a technical book—it's a how-to-do-it book on the preparation and presentation of grievances to arbitrators.

Anatomy covers such issues as the identification of a grievance for purposes of arbitration, determination of arbitrability, conferences between the parties and their counsel, and the actual proceedings. Kagel presents this through a running dialogue between the parties involved, with author comments.

This 182-page, soft cover book can be purchased from BNA Books Distribution Center, 300 Raritan Center Parkway, C.N. 94, Edison, New Jersey 08810, telephone (201) 225-1900, for $17.50. ■

Enforced Leave Constitutes Disciplinary Action, MSPB Holds

Asserting jurisdiction in an enforced leave case, the Merit Systems Protection Board declares that the Navy shipyard erred by removing the appellant from the workplace without following the adverse action procedures of 5 USC 7513. The employer took this action because the employee was medically restricted from wearing a safety hat.

The appellant, a mechanic, suffered from a medical condition causing a rash when he wore a hard hat. The shipyard required all workers in the controlled industrial area to wear hard hats. When the employee was unable to comply with the safety rules, management put him on enforced leave.

The Board, relying on its earlier *Passmore* ruling, held that agency use of enforced leave is disciplinary in nature and appealable to MSPB. This principle applies even where the employer believes that the appellant's retention on active duty poses a safety hazard to himself and fellow workers. (See the *Consultant*, July 18, 1986)

The Board ordered the shipyard to cancel the appellant's enforced leave and place him in active duty status. The employer must also restore his lost duty pay and benefits. (*Adams v. Navy*, MSPB Doc. No. PH07528610110, August, 19, 1986) ■

FLRA Differs with Judicial Decisions on Dues Recoupment

The Federal Labor Relations Authority, despite decisions of two courts to the contrary, holds that agencies can recoup dues erroneously withheld from an employee's wages and paid to a union by deducting the money from subsequent dues payments legitimately assigned by other employees.

In 1983 and 1984, the Fifth and Second Circuit Courts of Appeal overturned FLRA rulings that agencies could resort to this self help. In both cases, although former bargaining unit members had lost their checkoff rights as a result of promotions to supervisory jobs, the agency mistakenly continued to withhold dues from their salaries.

The appeals courts recognized the employer's right to recover dues mistakenly deducted. Nevertheless, management's setoff method impinged on statutory employee protections, the courts held. Bargaining unit members who assign part of their wages to a union have a right to expect that their money is used for that purpose.

The Authority said that while it accepted the two court decisions as the "law of the case," it had not altered its own original interpretation of the statute. (In everyday language, "law of the case" means that final judgment of the court applies only to the rights of the parties in that particular case.)

In this new case, the Air Force Logistics Command took money from current dues allotments to the American Federation of Government Employees and used it to repay workers whose dues were erroneously withheld. When the union filed unfair labor practice charges against the employer, the Authority dismissed the charges.

"Respectfully disagreeing" with the Second and Fifth Circuits, FLRA ruled that the Command did not violate the statute. Bargaining unit members who become supervisors can no longer be included in the unit and their statutory right to dues allotment stops immediately. The Command was just correcting an administrative error, the Authority asserted, and the setoff method was a lawful means of recoupment.

Once deducted, membership dues become part of a fund designated for forwarding to the union. The Authority reasoned that if an agency mistakenly sends the union too much money and then corrects the overpayment by setoff, the right of current members to have their dues remitted to the union is not violated. Rather, the portion of their dues used for recoupment was, in effect, prepaid by the employer through previous overpayments. (*FLRA No. 54*, Sept. 23, 1986) ■

Authority Reaffirms "Seasonal Supervisor" Policy Set Under EO 11491

The Federal Labor Relations Authority, relying on policy established under former Executive Order 11491, rejects the Agriculture Department's request for review of the status of "seasonal supervisors" in the Forest Service. These employees are excluded from the bargaining unit during the period they supervise seasonal workers, but are within the unit when they have no subordinates.

The seasonal supervisor question arose in the mid-70's. At that time the federal sector labor relations program was administered by the Federal Labor Relations Council under the Executive Order. The Council upheld the determination of the Assistant Secretary of Labor for Labor-Management Relations that seasonal supervisors were in the unit part of the year and out of the unit part of the year.

This year Agriculture challenged the policy. It contended that review should be granted based on the FLRA regional director's reliance on Executive Order law and in the absence of Authority precedent. Contrary to the employer's position, however, the Authority found no reason to change the long-standing policy. (*23 FLRA No. 47*, Sept. 19,1986) ■

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MSPB Must Review Removals Based on Revocation of Security Clearance

In a split decision, the U.S. Court of Appeals for the Federal Circuit holds that the Merit Systems Protection Board has authority to review the merits of agency security determinations when employees appeal removal actions based on agency denial or revocation of security clearances. The decision overturns the Board's own findings that it lacked this power of review.

MSPB had ruled that the law gives power to grant or deny clearances solely to Executive Branch agencies. Accordingly, Board review of clearance aspects of these cases was limited to deciding whether workers were afforded due process rights within their agencies. The appellant in MSPB's lead case took his complaint to the Federal Circuit and won.

The Navy hired him in 1981 for a noncritical-sensitive job repairing submarines, a job requiring satisfactory security clearance and medical reports. Almost two years later the employer denied him security clearance, then fired him. The Navy said that on the job application the worker failed to list his criminal convictions and participation in an alcohol rehabilitation program.

The appellant claimed that he did not list some charges because he was not found guilty, or the charges were dismissed or occurred before the seven-year time period cited on the application. He did list two convictions occuring within the last seven years. Also, alcohol had not been a problem for him for three years. His response included favorable statements from supervisors as to his background and character.

When he appealed to MSPB, the presiding official said it was impossible to determine whether the removal was reasonable since the Navy failed to establish what criteria were used or that the criteria were rationally related to national security. The agency did not show whether the appellant actually concealed prior offenses on his application.

Although the presiding official overturned the Navy's action, the full Board reversed him. The Board asserted that it had no authority to review an agency's denial or revocation of a security clearance which formed the basis for an employee's removal.

The Federal Circuit, by a two to one majority, reverses the full Board. "The heavy weight of law and precedent, Congressional intent, and fundamental rights," the court decides, "require that the Navy's action receive the same appellate review as other adverse actions taken under 5 USC § 7513." The court remands the case to the Board.

Chief Judge Markey, dissenting, argues strongly that MSPB's review of security matters is limited. The Office of Personnel Management says it is considering a request that the full Federal Circuit review this decision. (*Egan v. Navy*, App. No. 86-579, October 1, 1986) ■

NEW Developments...

Court orders MSPB to review denial of security clearance in removal... 1

Although upholding FLRA's "acting at all" standard, D.C. Circuit questions it...

Arbitration Roundtable
Maintenance workers at air base grieve late cancellation of Thanksgiving work, claim inconvenience and pay loss... 2

Labor-Management FORUM
Union not entitled to crediting plan information under FOIA... 3

Court upholds MSPB, Air Force in removal...

Federal Circuit says MSPB should not set penalties for misconduct... 4

Authority lengthens comment period on bargainability of drug testing...

Court Affirms But Criticizes "Acting at All" Test

The District of Columbia Appeals Court vetoes a union proposal requiring the employer to begin disciplinary investigations within 60 days of management's knowledge of the precipitating incident. The court upholds a Federal Labor Relations Authority finding that the proposal conflicts with the Interior Department's right to discipline.

The Authority said that "in certain circumstances" the National Federation of Federal Employees' proposal would prevent Interior from taking disciplinary action, thus violating FLRA's "acting at all" doctrine. Under this test, a proposal framed as a negotiable procedure may be found nonnegotiable if implementation would prevent an agency from acting at all to exercise a reserved management right.

The court's opinion was written by now Supreme Court Justice Antonin Scalia. He voices a "deep suspicion" that FLRA, applying the "acting at all" standard, could as readily have come out the opposite way and as readily been affirmed by the court. The standard "lends itself to completely unprincipled and inconsistent application."

(Continued on page 4)

PM 1.13:

ARBITRATION
roundtable
The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Cancellation of Holiday Work

Casefacts: The grievance was brought by five maintenance employees at Scott Air Force Base, Illinois. In early October their immediate supervisors asked four of them if they were willing to work on Thanksgiving Day. All four volunteered to work. The fifth grievant, who was not a volunteer, was told to work that day.

Unknown to the supervisors, the Air Force had decided in early October that there would be no scheduled flights on Thanksgiving. An October 16 letter communicated this news to management at Scott. Nevertheless, it was not until the Friday before Thanksgiving, when managers were reviewing the coming week's assignments, that they realized no planes would be flying on the holiday.

The Monday before Thanksgiving the supervisors were notified that Thanksgiving flights were canceled. On Tuesday afternoon the supervisors told four grievants that they would not be needed to work on Thanksgiving. The fifth was not told of the shift change until Wednesday.

The contract between the air base and the National Association of Government Employees had several relevant provisions. Article V stated that nothing in the agreement affected management's statutory right to assign work and determine the personnel to conduct operations.

Under Section 2, Article VII, "When a change in duty hours, days or weeks currently in effect is proposed by the employer, such change will be announced in writing to the union and the employees at least 14 days in advance, except in emergencies, in order that the union may request to enter into negotiations and so that employees will be forewarned of a pending change."

Section 4 of Article VII said pay for holiday work must be consistent with law and regulations.

The union contended that the posted work schedule requiring the grievants to work Thanksgiving constituted the duty hours currently in effect. Section 2 required management to notify the union and employees 14 days in advance of changes in duty hours. The employer admitted it failed to notify the union when changing the Thanksgiving schedule, and the grievants were notified only one and two days in advance.

NAGE declared that it was impossible to carry out its duty to bargain in good faith when it did not have the proper information in advance. Employees were subjected to great inconvenience when they did not know what to expect on a holiday. Income expectations were unmet and family activities disrupted.

The union pointed out that no emergency was involved. Management knew about the cancellation as early as mid-October and had adequate time to notify NAGE and the workers. The union wanted time-and-a-half pay for the grievants for work they were scheduled to perform.

The agency maintained that Section 2 did not apply since there were no schedule changes like those contemplated by the article. Employees were merely assigned holiday work within the confines of their normal schedule and their assignments rescinded when management learned that no planes would fly that day and there would be no work for the grievants.

During negotiations, the employer asserted, holiday work did not come up in the context of Section 2. The intent focused on starting and quitting times only.

Management said it was unfortunate that through an oversight the grievants were not notified earlier. This was not a contract violation, however, since management retained the right to assign work.

Even if the arbitrator found a violation, the Back Pay Act did not permit wages to be paid for not working unless the employee would have worked "but for" management's action. Here the employees could not have worked since no planes were flying.

Issue: Did the employer violate Article VII by cancelling assigned work on the Thanksgiving holiday?

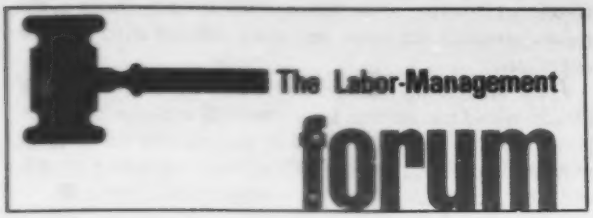
Award: Arbitrator Gladys W. Gruenberg denied the grievance. Although the agency failed to notify the grievants as soon as it learned no holiday work was available, her jurisdiction was limited to interpretation of the contract. Hence, unless the parties agreed in Section 2 to limit management's right to change all work assignments, there was no contract violation.

Section 2 must be read in the total context of Article VII and the entire agreement. In context, the section contemplated a major change in work schedules, referring to proposals and negotiations which were not possible in this case.

The arbitrator held that cancellation of holiday work when no work was available was not the type of change the parties had in mind when agreeing to Section 2. The grievants' regular hourly, daily and weekly schedule of employees was unchanged. Their Thanksgiving work assignment was under the same schedule they worked on other days. Their holiday pay would be overtime since they were already being paid for not working on the holiday.

The agreement required 14 days advance notice for a proposed change in duty hours, but no such change took place since the duty tour for the grievants remained the same. Section 2 did not contemplate holiday or overtime assignments.

Advance notice could easily have been given, and failure to do so caused considerable inconvenience to the workers since it involved loss of pay as well as change of plans for a family holiday. The arbitrator's jurisdiction, however, was confined to the contract regardless of what she considered good personnel practice and she could not order management to give such notice. (*Air Force and Local R7-23, NAGE*, May 23, 1986, LAIRS No. 17438) ■



Union Found Guilty of Unfair Labor Practice

Local 3511, AFGE engaged in an unfair labor practice by refusing to carry out an arbitration award after the Federal Labor Relations Authority dismissed the union's exceptions to the award, FLRA rules. It orders AFGE to comply with the award ordering the union, as a remedy for its libelous and defamatory attacks upon management, to run a newspaper advertisement acknowledging that the union's charges were erroneous. The union must also give television stations a copy of the ad and other information. (*23 FLRA No. 77*, September 30, 1986) ■

Court Says Agency Need Not Release Crediting Plans Under FOIA

In a suit brought under the Freedom of Information Act, the U.S. Court of Appeals for the District of Columbia rules that the U.S. Customs Service is not required to give the union copies of the parts of promotion crediting plans used to evaluate employee experience for several different positions. (Crediting plans contain criteria used by management to evaluate job applicants.)

The National Treasury Employees Union asked for 63 plans covering seven different positions in all nine agency regions. The agency agreed to give the union parts of 44 plans but refused to provide any of the remaining 19.

In arriving at its decision, the D.C. Circuit applied two tests established in an earlier court decision to determine whether the material was related solely to an agency's internal personnel rules and practices. The act exempts material of this kind from disclosure.

The first test is that the material must be predominantly internal to the agency. The second is that disclosure would significantly risk circumvention of agency regulations or statutes.

The court rules that the material meets both criteria. Although appointment decisions have some impact on the public, they are primarily a question of internal significance to agencies. Crediting plans, therefore, are indisputably concerned with personnel rules and practices even under the narrowest reading of that phrase.

The second test is met if disclosure of the material renders the crediting plans operationally useless whether or not the agency identifies a specific statute or rule threatened by disclosure. Here disclosure would make the plans ineffective because applicants could embellish or fabricate backgrounds to suit the plan. The Customs Service lacked the resources to identify fabrications, verify their falsity, or pursue applicants with legal action.

Finally, the court concludes that Congress did not intend to mandate the release of crediting plans which are commonly treated as confidential by personnel departments in both the public and private sectors.

The D.C. Circuit did not consider whether crediting plans must be disclosed to a union for purposes of representing employees under the Federal Labor-Management Relations Statute. That issue currently is being considered by the Federal Labor Relations Authority in several cases. (*NTEU v. U.S. Customs Service*, USCA DC Cir., No. 84-5754, Sept. 26, 1986) ■

Judges Affirm Removal Action

Basing its decision partially on the interpretation of a contract provision, the U.S. Court of Appeals for the Federal Circuit finds that the Air Force's removal of the appellant was reasonable and that the Merit Systems Protection Board correctly upheld management's disciplinary action.

The complicated case started when the appellant brutally assaulted his supervisor off-duty. He appealed his removal to the Board, which sustained the removal.

The employee then sought judicial review by the Federal Circuit. The court held that substantial evidence supported the charges against him, the penalty was reasonable, and there was a nexus between his dismissal and the efficiency of the service.

However, the court also found that the agency's impermissible "command influence" on the deciding official was harmful error violating regulations and due process requirements. It reversed the MSPB decision. The unpublished opinion noted that the employer could make a second attempt to fire the appellant by legal procedures.

The Air Force reinstated the appellant with back pay, but served him with a new notice of removal for the same offense. He again appealed to MSPB. The Board said no harmful error was committed during the new removal proceedings and that the contract provision did not prohibit the agency from firing him. Under that provision, if an adverse action proceeding is conducted and the employer is directed to impose a lesser disciplinary action, the decision is final and not subject to further review under the grievance procedure.

MSPB sustained the removal, deciding that the contract provision applied only to the grievance procedure, not to Board review. Further, the provision was designed to bar the union from continuing to grieve a mitigated penalty, not to prevent the agency from re-instituting an adverse action.

When the employee sought review of this second MSPB decision, the Federal Circuit upheld the MSPB.

The court rejects the appellant's other arguments that the Board improperly found a nexus and abused its discretion by affirming the removal penalty. Violent assaults on one's supervisor, says the opinion, have a chilling effect on supervisory-employee relationships and adversely impact on the agency's ability to fulfill its mission. (*Dominguez v. Dept. of Air Force*, USCA Fed. Cir., App. No. 86-853, Oct. 8, 1986) ■

FLRA Extends Comment Period on Negotiability of Drug Testing

In the October 17 *Federal Register* the Federal Labor Relations Authority extends the deadline for comments on the negotiability of union proposals on agency-initiated drug testing. The new cutoff date is January 20, 1987. FLRA granted the extension in response to requests by the Office of Personnel Management and the Justice Department.

Labor and management concern was heightened by President Reagan's recent Executive Order requiring a drug-free federal workplace. FLRA has several drug-testing proposals before it covering implementation, privacy, frequency, changes in agency regulations, etc. The Authority must determine which reserved management rights, if any, will be affected by the proposals. ■

MSPB Should Not Itself Set Misconduct Penalties

Citing the First Circuit's 1983 *Weiss* decision, the U.S. Court of Appeals for the Federal Circuit says penalty determinations for employee misconduct are judgment calls that should be left to the discretion of the employing agency.

The case arose when the appellant was dismissed by General Services Administration and the Merit Systems Protection Board rejected his appeal. He then challenged the Board's support of the GSA action, arguing unsuccessfully that MSPB itself must determine the appropriate penalty and that the Board's findings were not supported by substantial evidence. The court found "nothing in either the language or the legislative history of the Civil Service Reform Act that supports, much less requires, that result."

The Federal Circuit concluded that MSPB must review agency penalties solely to see whether management arbitrarily or capriciously abused its discretion in determining a penalty. This conclusion, the court noted, "comports with the language and purpose of the act and is consistent with settled principles of administrative law governing review of agency penalties."

Before passage of the act, the penalties for employee misconduct were usually left to the "sound discretion" of the agency. The only exceptions were unusually harsh punishments or those exceeding penalties permitted by law or regulation. The court ruled that the Reform Act did not change this long established policy. (*Beard v. GSA*, USCA Fed. Cir., App. No. 85-2035, Sept.19, 1986) ■

Official Time Proposal Is Bargainable

The National Association of Government Employees' proposal giving the union secretary time to process and expedite grievances is negotiable, the Federal Labor Relations Authority declares. The Veterans Administration had argued that the secretary would use the time for internal union business and that that official time cannot be used for internal union business.

The Authority says that "Participation in grievance proceedings and preparation for them do not relate to the institutional structure of the union. They are at the heart of the representational activities for which official time may be negotiated."

Then, addressing management's concern that the NAGE official would use the time for internal union business, FLRA points out that procedures such as discipline or unfair labor practice proceedings are available to deal with misuse of official time. (*23 FLRA No. 74*, September 30, 1986) ■

"Acting at All," *(Continued from page 1)*

The D.C. Circuit and other courts earlier supported the standard as a reasonable construction of the law. The opinion says that later experience raised doubts about whether the standard was "theoretically sound or practically susceptible of principled application."

The opinion contrasted FLRA's treatment of two proposals requiring advance scheduling of certain work. In one case FLRA ruled bargainable a proposal requiring 10 days' notice of changes in assignments which would delay but not prevent management's exercise of its right to assign work. In another it found nonnegotiable a proposal requiring 30 days' advance scheduling for training drills. In FLRA's judgment, this prevented management from acting at all to assign certain training.

In another example, FLRA found nonnegotiable a proposal preventing an agency from taking disciplinary action against an employee so long as the employee is enrolled in a drug or alcoholism treatment program and is making progress. However, FLRA found negotiable a proposal giving employees who enter treatment programs a reasonable opportunity to improve performance before being subject to adverse action.

The court is bound by its initial approval of the "acting at all" test. However, Judge Scalia questions whether it will be able to live indefinitely with a test that conceals rather than explains the FLRA's policy judgments which ultimately determine whether substantive management rights have realistically been impaired."

The court decision was not unanimous. Judge Starr concurs with the opinion except that part criticizing the "acting at all" doctrine. (*NFFE, Local 615 v. FLRA*, USCA D.C. Cir., No. 85-1299, September 12, 1986) ■

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Federal Circuit Explains "Retaliation Test" in Whistleblowing Case

The U.S. Court of Appeals for the Federal Circuit clarifies one of the tests used in adjudicating whistleblowers' claims of illegal retaliation. The court rejects an employee's allegation that the Army fired him in reprisal for having engaged in protected activities. The decision upheld the Merit Systems Protection Board ruling that the agency was justified in removing him for unacceptable performance.

The Federal Circuit relied on its *Hagmeyer* decision which established four tests which must be met before a petitioner can prevail with a claim of illegal retaliation:

Test 1. Protected disclosure was made.
Test 2. The accused official knew of the disclosure.
Test 3. Retaliation resulted.
Test 4. There was a genuine nexus between the retaliation and the petitioner's removal.

The court agreed with MSPB that this case met Tests 1 and 2, but voiced concern that the Board's presiding official misinterpreted the interrelationship between Test 3 and Test 4. According to the court, what it meant in *Hagmeyer* was that Test 3 should be construed as follows: "The adverse action under review could, under the circumstances, have been retaliation."

Under Test 3, the Federal Circuit said, if officials aware of the protected disclosures and even slightly involved in them, advise or effectuate the whistleblower's removal, "this may justify an inference of a retaliatory motive sufficient for Test 3."

If this inference is made, then Test 4 requires that the intensity of their motive to retailiate must be scrutinized and weighed with the gravity of the misconduct charged or inadequacy of work performance so "that the trier of fact can make an informed and reasoned determination whether the 'nexus' exists." That is, whether the reprisal was a significant factor in the agency's decision to remove. If so, the employee will prevail in his appeal based on the agency's improper motive.

In this case, management warned the employee of his poor work on a new job, gave him extensive instruction, put him on a 90 day improvement period, and finally fired him. His protected activities included an unsuccessful lawsuit challenging his position classification and treatment by management, writing his senator regarding promotion, and filing an Equal Employment Opportunity complaint.

The court concluded, as did MSPB, that the Army officials concerned with the adverse action were not direct targets of the appellant's protected disclosures. Consequently, he could not establish that his removal was in retaliation for his protected activities. (*Warren v. Army*, USCA Fed. Cir., App. No. 86-817, Oct. 24, 1986) ■

NEW Developments . . .

Agencies must provide unions with names, addresses of unit members . . . 1

Court clarifies test used in adjudicating whistleblower claims . . .

Arbitration Roundtable
Naval worker grieves discipline imposed for failure to report overpayments in paycheck . . . 2

Labor-Management FORUM
Authority reports on FY 86 . . . 3

Policy for handling drunk drivers is internal security matter . . .

Panel-appointed abitrator orders both parties to withdraw flexitime proposals . . . 4

Authority rules out union crediting plan proposal . . .

Reversing Policy, FLRA Tells Agencies to Release Employee Addresses to Unions

In a complete turnabout, the Federal Labor Relations Authority rules that agencies must, upon request, furnish the exclusive representative with names and home addresses of workers who are members of bargaining units represented by the union. Until now, FLRA policy was that the Privacy Act barred disclosure of this information.

The Authority says that after balancing employees' privacy interests against the public interest in disclosure, it concluded that the balance tilted toward disclosure. It was mindful of an appeals court finding that FLRA wrongly dismissed a union complaint that management unfairly refused to provide unit members' names and addresses.

Last March the U.S. Court of Appeals for the Second Circuit held that the privacy interest of the average employee in his address was not compelling. The court also noted that alternative means of communication available to unions, such as bulletin boards, were inadequate.

(Continued on page 3)

PM 1.13:

ARBITRATION

roundtable

The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

Who Would Have Figured?

Casefacts: The grievant, who worked at a Naval Air Rework Facility, was fired for not notifying management of overpayments on his paychecks. Management took the removal action after auditing the payroll records of more than 500 employees for a year. The investigation was triggered by an employee who accused a payroll clerk of making improper payments.

The audit showed that the grievant was one of a group of employees receiving excessive payments. The Rework Facility asserted that he was not discharged because of his possible fraudulent involvement in the scheme, although the investigators suspected a conspiracy between some employees and the payroll clerks.

Rather, the grievant was removed because he received money which was not due him and he made no effort to notify authorities of this fact. Management reasoned that every employee had a moral obligation to report an overpayment as a matter of "honesty and trust" in the employment relationship.

The agency charged the grievant with receiving improper payments for overtime not worked on four separate occasions. Each time the overpayment amounted to about $100 in additional pay, and the total overpayment came to $475. Management considered this too large an amount for him to ignore.

Vouchers accompanying the paychecks showed the gross amount of overtime earned for the preceding pay period. However, hours of work were not shown, nor was there any notation if the overtime pay included retroactive pay. On the reverse side of the paycheck, printed instructions asked employees to verify the check's accuracy. All employees were expected to notify their supervisors if their paychecks contained discrepancies.

The grievant asserted that during the payroll periods in question he was going through an apprentice program where paystep increases were generally made every quarter. Moreover, during the months in question, he worked many overtime hours for different supervisors and some payments for overtime were not credited until a later paycheck.

The employer argued that the removal penalty was justified. Since the grievant was well aware of the rules regarding validation of payments, his failure to follow the guidelines was willful. The amount of the overpayments were large enough that he should have brought the discrepancies to the agency's attention.

Even though management did not use the issue of fraud as a point in removing the employee, the employer maintained that the overpayments raised questons regarding his complicity with the payroll clerk. It was difficult for management to determine why a payroll clerk would carry out such an action except for good reason.

The investigation revealed other employees who received overpayments. Eleven other workers were removed, three got 30-day suspensions, six got 14-day suspensions, one received a seven-day suspension, and two were given "letters of caution." The agency contended that the difference in penalties was justified because of mitigating factors in cases where the employees received lesser penalties.

In the grievant's case, even after considering his nine years of service and absence of prior disciplinary action, the employer found that it could not tolerate his violation of trust. Management asserted that he was not unfairly singled out from the other employees.

Lodge 739, International Association of Machinists argued that the employer failed to provide sufficient evidence of the grievant's obligation to report overpayments. Even if he had such an obligation, he would have been unable to detect the overpayment.

The union emphasized that the employee rotated through approximately 30 shops and each foreman signed off on his time card. Given this, it was impossible, when combined with periodic step increases and fluctuating overtime, that he could have properly known what his pay was from paycheck to paycheck.

IAM also asserted that the grievant was disparately treated since some other workers received only suspensions for their failure to report overpayments. Article 23 of the parties' contract provides that the "Employer and the Union desire that all employees in the unit be treated fairly and equitably."

Issue: Was there just cause for the removal of the employee for failing to notify management of overpayments?

Award: Arbitrator Donald D. Connors, Jr. mitigated the removal to a 30-day suspension without pay and ordered the grievant to make restitution of the overpayment.

The arbitrator gave considerable weight to several mitigating factors which affected the grievant's ability to evaluate his paycheck. One fact which he considered especially important was the scant amount of information provided on the employee's pay stub.

Arbitrator Connors ruled that the employee's negligence in this case was "slight at most." Even though he was negligent to some degree, removal was not an appropriate punishment. Such an action would not "promote the efficiency of the service."

The award noted that there was no proof of the grievant's knowledge of the overpayments. The possession of such knowledge, though, was not central to management's decision. The employer's action was based on the premise that the grievant failed to report the excessive wages to management. (*Dept. of the Navy and Lodge 739, IAM*, February 27, 1986, LAIRS No. 17188) ■

FLRA Distinguishes Between Matter and Issue

In ruling on an arbitration appeal the Federal Labor Relations Authority determines that the *matter* being grieved is a suspicion rather than the employee's allegation of discrimination.

When the U.S. Marshals Service proposed suspending the employee, he filed a formal discrimination complaint charging that he was being discriminated against because of his age and race. He also amended an unfair labor practice charge to claim that the agency was proposing to suspend him because he engaged in activities protected by the Federal Labor-Management Relations Statute.

After he was suspended, he also filed a grievance under the negotiated procedure claiming the suspension was discriminatory and not for just cause. The arbitrator ruled that the employee could not grieve the claim of discrimination because he had filed a formal discrimination complaint. (Where an employee alleges discrimination, the law allows the employee to raise the *matter* under the statutory procedure or the negotiated grievance procedure but not under both.)

The arbitrator ruled, however, that the issue of just cause was a different *matter* which could be raised under the negotiated grievance procedure. The Service appealed the arbitrator's award.

The Authority finds the award deficient. In this case, FLRA says, the *matter* was the suspension. It was not discrimination or just cause. Therefore, when the grievant filed a formal discrimination complaint concerning his suspension he selected the statutory procedure and could not raise the same matter through the negotiated procedure. (*23 FLRA No. 78*, Oct. 7, 1986) ■

Navy Procedures to Handle Drunk Drivers Are Not Negotiable, Court Holds

The Navy memorandum implementing a new Defense Department policy for handling drunk drivers on government property is an internal security practice, the U.S. Ninth Circuit Court of Appeals says, and union proposals concerning the memo are not bargainable. The American Federation of Government Employees' proposals, if adopted, would interfere with management's statutory right to determine the internal security of the agency.

The memo mandates temporary suspension of on-station driving privileges if an employee refuses to take a sobriety test or the agency receives an arrest report for drunk driving. If convicted, the employee's driving privileges are revoked for a year. Employees who receive temporary suspensions may ask for a hearing to contest management's action.

AFGE proposed that workers arrested for drunk driving retain driving privileges until convicted by a civilian court. Moreover, that suspension of privileges for refusal to take a sobriety test be in accord with state law, and disciplinary action taken for refusal be no greater than that imposed by the state court.

The Ninth Circuit sustained the Federal Labor Relations Authority's decision that the proposals were nonnegotiable. It adopted FLRA reasoning that the proposals would "restrict the agency's right to determine policies and take actions to secure or safeguard its personnel and physical property." (*American Federation of Government Employees, Local 1931 v. Federal Labor Relations Authority*, USCA Ninth Cir., No. 85-7623, October 20, 1986) ■

NFFE Proposals On Promotion Held Bargainable

The Federal Labor Relations Authority rules negotiable two proposals made by the National Federation of Federal Employees. The first proposal, as interpreted by the union, would require the employer to consider for promotion bargaining unit members before considering employees from other sources.

The second union proposal would require management to rate and rank bargaining unit applicants before expanding the area of consideration. The employer, the U.S. Corps of Engineers, must bargain over both proposals. (*23 FLRA No. 79*, Oct. 14, 1986) ■

FLRA reverses policy, (*Continued from page 1*)

FLRA decided that a union's need for this information relates to the nature of exclusive representation itself. "It is obvious that a union must be able to identify and communicate with bargaining unit members if it is to adequately represent them," FLRA observed. Moreover, the federal sector labor statute requires management to supply the union with data necessary for bargaining.

Before reaching a decision, the Authority asked interested parties to file *amicus* briefs on this and other unfair labor practice cases covering the same issue. FLRA also asked several appeals courts to remand similar cases which were awaiting judicial review.

FLRA points out that the release of names and addresss is consistent with private sector precedent. The National Labor Relations Board has long held that this data is relevant to a union's role as bargaining agent either during contract negotiations or during the term of an agreement.

The Authority determines that the release of the information to unions is not prohibited by law, is necessary for the union to fulfill its statutory duties, and meets other requirements of 5 USC 7114(b)(4). It ordered the Farmers Home Administration Finance Office to provide this data to Local 3354, AFGE. (*23 FLRA No. 101*, Oct. 31, 1986) ■

Back to the Future

Patrick J. Halter, a mediator-arbitrator appointed by the Federal Service Impasses Panel, directed the Library of Congress and the American Federation of State, County and Municipal Employees (AFSCME) to withdraw their bargaining proposals on hours of duty and maintain the provisions of their former agreement on the subject. He issued his decision after mediation failed to resolve the differences between the library and the union concerning a flexitime schedule for employees assigned to the law library.

AFSCME proposed an arrangement under which employees could arrive for work between 7:00 a.m. and 9:30 a.m. During a core time between 9:30 a.m. and 3:30 p.m. the entire staff would be present for duty. The proposal allowed for certain exceptions and variations in applying the schedule to specific groups of workers. The union contended that the schedule was in effect in other parts of the library where it had worked successfully.

The union argued that adoption of its terms would result in improved morale, a decrease in the use of leave, more efficient use of facilities, and extended hours of service to the public. Under the current agreement workers may report for duty between 7:00 a.m. and 9:00 a.m. AFSCME noted that its proposal would add only 30 minutes to the existing arrival times.

Management asked for a reporting time between 8:00 a.m. and 9:00 p.m., with core hours from 9:00 to 4:30 p.m. The employer maintained that its schedule would result in an increase in productivity and level of services, in addition to cost savings.

In support of its position the library stated that the primary customer of the law library is the Congress whose members "arrive late and stay late." Further, surveys of the library's clients indicate that they want service to be available after 4:00 p.m.

Arbitrator Halter was not convinced by the union's argument suggesting that the success of its proposed schedule in other parts of the library would be duplicated in the law library. He noted that the law library had a small staff with unique skills. On the other hand, divisions elsewhere in the library employed large numbers of workers having similar abilities. Further, the union failed to present any evidence to show that the claimed benefits of its proposal had actually occurred in those areas where it was in effect.

In rejecting management's justification for its terms, the arbitrator found that the evidence showed that over 95 per cent of Congressional and public users of the library were satisfied with the service they received under the existing arrangements. He saw no indication that inquiries or telephone calls received after 4:00 p.m. were not answered in a timely manner. While 4:00 p.m. is the end of the existing core hours, the library remains open until 5:30, presumably with adequate staff.

In view of the high level of satisfaction with the library's services under the existing duty hours and the absence of adequate reasons for adopting either parties' proposals, Arbitrator Halter directed that the current work times be retained in the new agreement. (*Case No. 86 FSIP 87*, Sept. 16, 1986) ■

Release of Crediting Plans Conflicts with Government-Wide Rule

The National Treasury Employees Union's proposal that crediting plans be disclosed upon request is not negotiable, the Federal Labor Relations Authority holds, because it conflicts with FPM Supplement 335-1, a government-wide regulation. (Crediting plans involve standards used by management to evaluate the experience of job applicants.)

The Authority notes that the supplement permits release of the plans where this would not give an unfair advantage to some job applicants or compromise the utility of the selection process. In FLRA's judgment, the determination to release the plans must be made by the agency on a case-by-case basis.

Here, the Authority says, nothing in the NTEU proposal would limit the U.S. Customs Service's obligation to comply with a union request for disclosure of crediting plans where the disclosure would be contrary to the supplement. The proposal authorizes a blanket disclosure, regardless of whether the plans' release would undermine the fairness and validity of the selection process. Accordingly, it was outside management's duty to bargain.

The Authority's ruling followed in the wake of an appeals court decision that the Freedom of Information Act does not require federal employers to give unions copies of crediting plans. For the story on the court decision, see the *Consultant*, November 7, 1986. (*23 FLRA No. 91*, October 29, 1986) ■

Authority Reports Progress in FY 86

The Federal Labor Relations Authority reports that in Fiscal Year 1986 it made substantial progress in reducing its inventory of pending cases and the time used to process cases. It closed 614 cases, thus reducing the inventory of pending cases from 460 at the beginning of the fiscal year to 389 cases at the end. This is the smallest year-end inventory FLRA has had since the close of FY 1979.

The Authority emphasized its goal—set last year—of closing all cases within six months of their receipt. FLRA has been under fire from labor organizations for what they consider unreasonable delays in processing negotiability and unfair labor practice appeals. ■

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NEWARK PUBLIC LIBRARY

FPM Requirement Is Government-Wide Regulation

U. S. GOVT. PUB

Federal sector labor law bars bargaining on union proposals inconsistent with government-wide rules or regulations, and a Federal Personnel Manual requirement is a government-wide regulation, a federal appeals court determines. So finding, the court upholds the Federal Labor Relations Authority determination that the union proposal conflicted with the FPM and was therefore not negotiable.

In 1981 FLRA first held nonbargainable the American Federation of Government Employees' proposal that employees downgraded through no fault of their own be promoted ahead of other applicants. The Authority found this violated management's reserved right to promote.

The U.S. Court of Appeals for the District of Columbia overturned FLRA's decision. In remanding the case, the court suggested that FLRA might consider management's argument that the proposal conflicted with the FPM. After a second look, the Authority found that the proposal would foreclose appointments from sources other than repromotion eligibles. This violated FPM Ch. 335 S1-5c(6) which protects management's right to select from among a group of best qualified candidates or from other "appropriate sources."

When AFGE again sought court review of its proposal, the D.C. Circuit sustained the Authority. While the FPM permits management to select a repromotion eligible, the court said, it also requires that management not be obligated to do so, as would be the case under the union proposal.

In a footnote the opinion noted that "the FPM obviously partakes of the nature of both policy guidance and binding regulation." Since Ch. 335 enforces a federal regulation on merit promotion, there was little doubt that the disputed section qualified as a binding regulation. (*AFGE Local 2782 v. FLRA*, USCA D.C. Cir., No. 85-1562, October 21, 1986) ■

Court Penalizes "Frivolous" EEO Appeal

The U.S. District Court for the Eastern District of Michigan (Southern Division) imposes fines of $500 each against a federal employee and his attorney for bringing a "baseless" discrimination suit against the U.S. Army's Tank-Automotive Command (TACOM). The employee contended that he was denied promotion because of his race. After he lost his EEO complaint, he filed suit in district court.

The court held that TACOM used legitimate, nondiscriminatory criteria in ranking the job applicants. It further found that the plaintiff scored significantly lower in an important area of experience than did the person selected for the job. Since the employee failed to prove that his nonselection was discriminatory, the court ruled in favor of TACOM.

Judge Zatkoff wrote that "the court was deeply troubled by the total lack of evidence supporting plaintiff's case... This was the case of a disgruntled employee who was passed over for promotion who also happens to be a black man." Such a "disturbing paucity of evidence" warranted examination of the basis for the continued maintenance of the law suit.

The opinion pointed out that "every litigant in federal court is bound by the general proscription against the maintenance of baseless litigation." Rule 11 of the Federal Rules of Civil Procedure now requires the attorney to certify that the pleading is reasonable and made in good faith, with sanctions if it is not.

In this case the court concluded that the complaint and final pretrail order were signed in violation of Rule 11. The case's defense and trial involved considerable time and money at taxpayers' expense, and the court did not take lightly this "needless drain on the public coffers."

Judge Zatkoff accordingly assessed the "lenient" amount of $500 on both the plaintiff and his attorney. While the court was ready to hear all meritorious cases, he said, the crowded federal court dockets "cannot tolerate the burden posed by factually baseless suits that drain judicial resources." (*Edwards v. Marsh, Sec. of Army*, USDC Eastern Dist. Michigan, S.D., No. 85-CV-72578, Oct. 14, 1986) ■

NEW Developments...

Court classifies FPM as government-wide reg on which law bars bargaining... **1**

Attorney, employee assessed $500 for bringing baseless EEO appeal...

Arbitration Roundtable **2**

Should management have found light-duty job for injured worker instead of firing him?...

Labor-Management FORUM **3**

Employee with part-time EEO duties included in bargaining unit...

Duty tour proposal is not negotiable...

Authority finds unfair labor practice at Dugway Proving Ground... **4**

Court remands pay case to FLRA for "fully articulated" decision...

PM 1.13:

ARBITRATION
roundtable
The Roundtable provides instruction in preparing for arbitration. It shows how work problems are resolved through negotiated grievance procedures.

No Light Duty

Casefacts: When the U.S. Missile Command at Redstone Arsenal eliminated a job to which the grievant had been detailed as a light duty assignment, it placed him on leave without pay. His grievance asked that he be made whole for the period he was out of work.

The employee, a long-term water treatment plant operator at the arsenal, suffered from back injuries and a minor loss of hearing. He had first injured his back on the job when a bench he was sitting on broke and he fell. Later he suffered additional back injuries in an automobile accident. Finally, in another on-the-job incident, he suffered a jolt to his back while descending some stairs.

His personal physician noted that the employee had been placed on physical restrictions by an occupational therapy specialist. Consequently, the grievant was not supposed to lift over 15 pounds or push or pull objects weighing over 50 pounds. The agency physician stated that the grievant could work on a job requiring no lifting over 15 pounds, no heavy pushing or pulling, and no work on unprotected ladders or scaffolding.

Management arranged for a committee to test and examine the duties of the employee's job. The committee found that the job involved pushing 100 pound containers and opening and closing valves which required pushing or pulling substantially more than 50 pounds.

Deciding that the employee could no longer perform his job because he might injure himself more seriously, the employer detailed him to the fire department as a general communications equipment operator. Several months later the detail ended when his supervisor decided that the grievant had a hearing problem. The agency decided to abolish the job.

After determining that no other light duty jobs were available at the employee's grade level, the employer placed him on "appropriate leave." Because he had no sick or annual leave available, this meant he was placed on leave-without-pay.

Shortly after that, the agency underwent a reduction in force. The employee was on leave-without-pay for eight months before he returned to work at a lower level job.

Local 1858, American Federation of Government Employees claimed that the grievant was capable of performing his regular job and that he had performed the job successfully despite his back injuries. Witnesses testifed that he had performed the job well. The fact that the grievant received an exceptional rating showed that he was capable of performing the job, AFGE asserted.

The union also argued that management violated an agency policy by not making a concerted effort to place the employee in a light duty job. Also, the agency should have placed him in Priority 5 for mandatory placement.

(Priority 5 was an agency priority classification of 19 different groups of employees who had been displaced from their jobs. It provided the order in which displaced employees were to be considered for vacancies before the vacancies were posted.)

The employer responded that the physical restrictions were properly imposed by medical personnel and that it could not return him to his regular job. His hearing problem presented an unacceptable risk in the communications job at the fire department.

There were no other light duty or other jobs for which the employee qualified at his grade level which he could physically perform, management maintained. Also, he did not ask to be considered for a lower level job, and the agency could not put him in a lower level job unless he volunteered.

Issue: Did management violate the collective bargaining agreement when it placed the grievant on "appropriate leave?" If so, what was the appropriate remedy?

Award: Arbitrator William D. Ferguson denied the grievance. He found the first issue was not whether the grievant could perform the duties of the water treatment plant operator job. The issue was whether he could perform the job safely without endangering his own health.

The grievant admitted that it hurt to perform some duties but he performed them anyway. The arbitrator observed that this is the very reason management frequently removes employees from jobs because of physical restrictions. The employee will continue to do the job even if it hurts, and may disable himself. It is the duty of management to protect an employee from injuring himself.

The arbitrator found that the agency acted properly when it removed the grievant from the communications duties at the fire department because of the danger that he might not understand a communication or hear a warning bell in time to act promptly. Here it was the safety of others that management had to consider. In addition, management was within its rights when it abolished the communications job and decided to rotate the duties among employees.

Arbitrator Ferguson concluded that there was not one iota of evidence that there was a light duty job available for the employee when he was put on leave. Agency policy did not require management to place the employee if there were no light duty jobs. He had himself decided not to accept any lower grade position.

Finally, the priority classification list did not require mandatory placement. The union failed to show that the grievant should have been placed on the list in Priority 5 in the absence of any available vacancies for which he was qualified at a grade he would accept. (*Redstone Arsenal and American Federation of Government Employees, Local 1858*, August 11, 1986, LAIRS No. 17473) ■

Collateral-Duty EEO Counselors Are Included in Unit

Employees at the Luke Air Force Base, Arizona who spend no more than 10 or 20 percent of their time as Equal Employment Opportunity counselors are not engaged in federal personnel work, the Federal Labor Relations Authority rules, and they should be included in the bargaining unit.

The primary function of the collateral-duty counselors is to counsel workers at the pre-complaint stage. They do not serve for a fixed time period. Further, management can terminate their EEO duties at any time, or the counselors themselves can terminate their assignments.

The Federal Service Labor-Management Relations Statute bars nonclerical personnel employees from union representation. The Authority has previously ruled that full-time EEO employees cannot be included in a unit since they perform personnel work which may affect unit workers and make recommendations to management concerning personnel actions.

In contrast, the Authority said, these collateral-duty counselors are considered neutral and a bridge between management and the employees. They are not viewed as being aligned with either group. (*23 FLRA No. 99*, Oct. 31, 1986) ■

FLRA Abandons *Fort Detrick* Rationale

The Federal Labor Relations Authority has altered its interpretation of 5 CFR 610.121(a) which deals with how and when agencies can change tours of duty. FLRA now says that to conform with the regulation management must give workers at least seven days' advance notice of a change in work schedules unless the change is made for the reasons set forth in the statute and the Code of Federal Regulations.

FLRA's interpretation is the basis for deciding whether union proposals requiring employers to give more than seven days' notice of the changes are negotiable.

The law says an agency must schedule duty tours not less than seven days in advance. The only exceptions are if the agency determines that it would be seriously handicapped in carrying out functions or that costs would be substantially increased.

In the 1985 *Fort Detrick* decision, the Authority interpreted the law's enabling regulations as meaning that an agency must change work schedules as soon as it became aware that change was necessary. Last August, however, a federal district court gave different reasons why the union proposal in *Fort Detrick* was not acceptable.

In light of the court's decision, FLRA reconsidered the basis of its *Fort Detrick* decision. It then decided that it will no longer follow that rationale.

In the present case the National Association of Government Employees proposed to Scott Air Force Base that when considering a change in duty tours, management must notify the union and workers at least 14 days in advance, except in an emergency.

The Authority said the proposal was not bargainable because "emergency" was not defined. That meant that circumstances handicapping the agency in accomplishing its functions or substantially increasing costs would not necessarily constitute emergencies. Consequently, the proposal would impermissibly restrict the employer's right, under law and regulation, to revise employee work schedules. (*23 FLRA No. 97*, Oct. 31, 1986) ■

Ending Exchange Privileges Is ULP

Eielson Air Force Base, Alaska acted unfairly by terminating Base Exchange privileges for employees without first bargaining over the change, the Federal Labor Relations Authority holds. FLRA found that the privileges were a past practice and a condition of employment.

About 17 years ago the base began allowing employees to patronize the exchange, grocery, gas station, furniture store, beauty and barber shops, laundromat, movie theater, etc. It did this to maintain a stable work force at the isolated facility. Fairbanks was 26 miles away, roads difficult, and travel dangerous in winter months.

In recent years commercial facilities became available off-base at North Pole, 13 miles away. To ensure adequate exchange service for military personnel, the employer decided to halt privileges for civilian workers. Local 1836, American Federation of Government Employees filed an unfair labor practice complaint.

The base lost its argument that the practice conflicted with an Air Force regulation for which a compelling need existed and that authority to extend exchange privileges was not delegated to the base level. The FLRA noted, as it has in other cases, that an agency cannot foreclose bargaining on an otherwise negotiable matter because authority does not reside at the level of exclusive recognition.

The Authority also concluded that in this particular situation exchange privileges were part of the employees' working conditions. It ordered the activity to cease and desist. (*23 FLRA No. 83, Oct. 16, 1986*) ■

The Original and Four Copies

On October 16 the Federal Labor Relations Authority reminded parties that any document filed with FLRA must be the original (or capable of being used as the original for reproduction purposes) and that four copies must accompany the original. ■

Dear Subscriber,

This issue closes out Volume 86 of the Consultant. *Volume 87 will begin with the next issue on January 16, 1987. Meanwhile, all of us extend to you and yours our*

Season's Greetings

AND BEST WISHES FOR CONTINUING SUCCESS THROUGHOUT THE NEW YEAR

. . . the Editor

Living Quarters for "Geographical Bachelors"

Dugway Proving Ground was guilty of an unfair labor practice when, without bargaining, it ended the past practice of assigning "geographical bachelors" to on-post, non-housekeeping quarters, the Federal Labor Relations Authority holds. ("Geographical bachelors" are employees who have families and residences off post but who live on post during the work week.)

Dugway is a remote installation 45 miles from the nearest community and 80 miles from Salt Lake City where housing is available. It has quarters which were built with a proviso that a portion would be set aside for civilian use because of the post's location. For many years the employer assigned geographical bachelors to these quarters.

The availability of housing was a recruitment tool. There was also a relationship between the housing assignments and hours of work. In addition, workers benefited financially because of the reduced commuting cost.

The Authority concluded that all these factors made the practice a condition of employment. Accordingly, management should have given the National Association of Government Employees a chance to negotiate before unilaterally changing the practice.

The Authority issued a make whole remedy retroactive to the date that management evicted the workers from their quarters. The employer must pay the increased expenses which the bachelors suffered as a result of their eviction (*2 FLRA No. 80*, Oct. 14, 1986) ■

Court Returns Pay Case to FLRA

Remanding an unfair labor practice case, the U.S. Court of Appeals for the Sixth Circuit directs the Federal Labor Relations Authority to explain more fully its reasons for denying back pay. The National Treasury Employees Union had requested a *status quo ante* remedy with back pay, but the Authority's remedial order authorized only prospective relief.

The case arose from U.S. Customs's proposed new shift of 9 a.m. to 6 a.m. with an hour's lunch break for inspectors at a large airport. Until then inspectors had worked a 9 to 5 shift, with no scheduled lunch break.

In negotiations with NTEU, Customs agreed to a 30 minute lunch break but refused to bargain on start and quit times. When management unilaterally imposed a 9:30 to 6:00 shift, the union filed a ULP complaint with the Authority. The new hours substantially reduced the overtime previously paid inspectors for work after 5:00 p.m.

The Authority, determining that the employer's action was unfair, told the agency to cease and desist. It rejected the union's request for back pay because NTEU did not prove that "but for the Respondent's improper refusal to bargain over the starting and quitting times, employees would have received overtime pay."

The Sixth Circuit refused to accept FLRA's "extremely brief explanation as adequate in light of the parties' stipulation concerning the substantial impact" that the hours' change had on working conditions. The court ordered the Authority to reconsider its decision and "articulate more fully its reasons for granting or denying the order of back pay." (*NTEU v. FLRA*, USCA 6th Cir., No. 85-3393, September 25, 1986) ■

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